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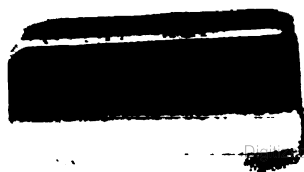
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MILITARY LAWS

OF THE

UNITED STATES

PREPARED IN THE OFFICE OF
THE JUDGE ADVOCATE GENERAL OF THE ARMY

1921

SIXTH EDITION

(IN TWO VOLUMES)

VOL. 2



WASHINGTON
GOVERNMENT PRINTING OFFICE
1921

283658

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CHAPTER 27.

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1593. Pay of the Army Fund.—All the money hereinbefore appropriated for pay of the Army and miscellaneous, except the appropriation for mileage to commissioned officers, warrant officers, members of the Officers' Reserve Corps

when ordered to active duty, contract surgeons, expert accountant, Inspector General's Department, Army field clerks, and field clerks of the Quartermaster Corps, when authorized by law, shall be disbursed and accounted for as pay of the Army, and for that purpose shall constitute one fund. *Act of June 5, 1920 (41 Stat. 956), making appropriations for the support of the Army.*

Similar provisions appear in previous appropriation acts for many years.

Provisions that no part of the sums appropriated for support of the Regular Army shall be used for the expenses of the organized militia while engaged in joint encampment, etc., of the Regular Army and militia, under sec. 15, act of Jan. 21, 1903 (32 Stat. 777), were added to that section by amendment by sec. 9, act of May 27, 1908 (35 Stat. 402). Said section was omitted as superseded by sec. 94, act of June 3, 1916, 2574, post.

For regulations for the method of making payments to enlisted men, see paragraphs 1315-1346, A. R., 1913.

1594. Examination of pay accounts.— * * * *Provided*, That hereafter all the accounts of individual paymasters shall be analyzed under the several heads of the appropriation and recorded in detail by the Paymaster-General of the Army before said accounts are forwarded to the Treasury Department for final audit, and the Secretary of War may hereafter authorize the assignment to duty in the office of the Paymaster-General, not to exceed five paymasters' clerks, now authorized by law. *Act of Mar. 2, 1905 (33 Stat. 832).*

1595. Pay of the Army forwarded by mail or express.— * * * *And provided further*, That hereafter the Secretary of War is also authorized to arrange for the payment of the enlisted men serving at posts or places where no paymaster is on duty, by check or by currency, to be sent to them by mail or express, at the expense and risk of the United States. *Act of Feb. 27, 1893 (27 Stat. 479).*

Notes of Decisions.

Loss of funds.—A paymaster of the Army who alleges that he inclosed certain sums of money in a package transmitted by him to an officer for the payment of

troops, which sums were not found in the package when received, the seals being unbroken, is not entitled to credit therefor. 6 Comp. Dec., 940.

1596. Officers to receive monthly payments.—The sums hereinbefore allowed shall be paid in monthly payments by the paymaster. *R. S. 1268.*

The reference in this section to "sums hereinbefore allowed" is to the sums allowed as pay of officers in *R. S. 1261-1267*, post, 1627, 1637, 1638, 1634, 1661, 1667, 1639.

Rules for division of time and computation of pay, where compensation is annual or monthly, 949, ante.

Notes of Decisions.

Overpayments.—See (1882) 17 Op. Atty. Gen. 603; (1885) 18 Op. Atty. Gen. 158; (1885) Gen. 425, 448; (1883) 17 Op. Atty. Gen. 18 Op. Atty. Gen. 220.

1597. Monthly payment of enlisted men, Signal Corps.—*Provided further*, That the pay of the enlisted men, including the items of commutation of quarters, and commutation of fuel, shall be paid monthly to each enlisted man entitled thereto by one check upon one properly certified voucher. *Act of Aug. 30, 1890 (26 Stat. 400), making appropriations for sundry civil expenses: Signal Service.*

This was the last of several provisos annexed to appropriations for pay, etc., of officers and enlisted men, "Signal Service." All the provisos preceding this related in terms to the Signal Service or Signal Corps, and this proviso appears not to have been intended to have any different application. The act was passed before the reorganization of the Signal Corps as part of the military establishment by act of Oct. 1, 1890, ante, 658.

1598. Delay in distributing pay.—The Army shall be paid in such manner that the arrears shall at no time exceed two months, unless circumstances shall render further arrears unavoidable. *R. S. 1189.*

1599. Computation of pay.—Hereafter, where the compensation of any person in the military service of the United States is annual or monthly the following rules for division of time and computation of pay for services rendered are hereby established: Annual compensation shall be divided into twelve equal installments, one of which shall be the pay for each calendar month; and in making payments for a fractional part of a month one-thirtieth of one such installments, or of a monthly compensation, shall be the daily rate of pay. For the purpose of computing such compensation and for computing time for services rendered during a fractional part of a month in connection with annual or monthly compensation, each and every month shall be held to consist of thirty days, without regard to the actual number of days in any calendar month, thus excluding the thirty-first of any calendar month from the computation and treating February as if it actually had thirty days. Any person entering the service of the United States during a thirty-one day month and serving until the end thereof shall be entitled to pay for that month from the date of entry to the thirtieth day of said month, both days inclusive; and any person entering said service during the month of February and serving until the end thereof shall be entitled to one month's pay, less as many thirtieths thereof as there were days elapsed prior to date of entry: *Provided*, That for one day's unauthorized absence on the thirty-first day of any calendar month one day's pay shall be forfeited. *Act of June 12, 1906 (34 Stat. 248), making appropriations for the support of the Army.*

1600. Advances of pay to persons at distant stations.— * * * The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled can not be regularly effected. *R. S. 3648.*

1601. Advances of pay to troops embarking for service in the Philippines.— * * * *Provided*, That troops about to embark for service in the Philippine Islands may, in the discretion of the Secretary of War, be paid one month's wages in advance prior to embarkation. *Act of July 7, 1898 (30 Stat. 721).*

This was a proviso annexed to the act providing for the payment and maintenance of volunteers during the interval between their enrollment and muster into the United States service (30 Stat. 420).

1602. Loss of service records no cause for withholding pay.— * * * *Provided*, That the pay due enlisted men of the Army shall not be withheld from them by reason of the fact that their service records or other official papers showing the status of their accounts with respect to pay have been lost or not returned from overseas and, under such regulations as may be prescribed by the Secretary of War, these men may be paid upon their personal affidavit as to date of last payment and condition of their accounts: *Provided further*, That payments made in accordance with such regulations (or which have already been made upon the affidavit of the soldier) shall be passed by the accounting officers of the Treasury to the credit of the disbursing officers making them. *Act of July 11, 1919 (41 Stat. 110), making appropriations for the support of the Army.*

See 1610, post, and notes thereunder.

1603. Pay status of captives taken by the enemy.—Every non-commissioned officer and private of the Regular Army, and every officer, non-commissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law. *R. S. 1288.*

Notes of Decisions.

Contributing to capture.—This section does not extend to one who was not in the discharge of his duties at the time of his capture, and who contributed to the disaster by culpably residing in a dangerous place, contrary to orders. *Phelps v. U. S. (1868), 4 Ct. Cl. 209.*

Discharge from service.—The sentence of a court-martial, including a forfeiture of all pay due at the time of trial or to become due thereafter, precludes an officer from a right to receive pay after trial and during his captivity, under this section,

whether the sentence was promulgated before or after his capture. *Phelps v. U. S. (1868), 4 Ct. Cl. 209.* But an officer, who did not violate his duty willfully nor intentionally at the time of his capture, and whose conduct then was an indiscretion, and not an offense, and who on his exchange demanded a court of inquiry and was refused, is entitled to his pay and allowances, notwithstanding he was dismissed the service by the War Department during his captivity. *Jones v. U. S. (1868), 4 Ct. Cl. 197.*

1604. Pay during captivity for nurses, field clerks, and civil employees.—That members of the Army Nurse Corps (female) or of the Navy Nurse Corps (female), Army field clerks, field clerks, Quartermaster Corps, and civil employees of the Army, shall be entitled to full pay and allowances during any period of involuntary captivity by the enemy of the United States; and their right to such full pay and allowances shall not be abridged or lost by reason of absence from duty when that absence is caused by involuntary captivity by the enemy of the United States. Any captivity by the enemy shall be construed to be involuntary until the contrary shall be affirmatively established.

All rights and privileges hereunder shall be in force from April sixth, nineteen hundred and seventeen, to the end of the existing war. *Act of Mar. 3, 1919 (40 Stat. 1321).*

1605. Assignment of pay by enlisted men.—No assignment of pay by a non-commissioned officer or private, previous to his discharge, shall be valid. *R. S. 1291.*

1606. Assignment of pay by commissioned officers.— * * * *Provided,* That hereafter all commissioned officers of the Army may transfer or assign their pay accounts, when due and payable, under such regulations and restrictions as the Secretary of War may prescribe. *Act of Mar. 2, 1907 (34 Stat. 1159), making appropriations for the support of the Army.*

1607. Assignment of pay by contract surgeons and contract dental surgeons.— * * * *Provided,* That hereafter contract surgeons and contract dental surgeons on duty in Alaska, Hawaii, the Philippine Islands, and Porto Rico may transfer or assign their pay accounts, when due and payable, in the methods now provided by regulations for commissioned officers of the Army: * * * *Act of April 23, 1904 (33 Stat. 266), making appropriations for the support of the Army.*

1608. Pay checks drawn as indicated by indorsement on pay account.— * * * *Provided,* That hereafter section thirty-six hundred and twenty,

Revised Statutes, as amended by the Act of Congress approved February twenty-seventh, eighteen hundred and seventy-seven, shall not be construed as precluding officers of the Quartermaster Corps from drawing checks in favor of the person or institution designated by indorsement made on his monthly pay account by any officer of the Army if the pay account has been deposited for payment on maturity in conformity with such regulations as the Secretary of War may prescribe: *Provided further*, That payment by the United States of a check on the indorsement of the indorsee specified on the pay account shall be a full acquittance for the amount due on the pay account. *Act of Mar. 2, 1913 (37 Stat. 710), making appropriations for the support of the Army.*

For R. S. 3620, and amendment see 249, ante.

1609. Retained pay.— * * * *Provided*, That hereafter no pay shall be retained, but this provision shall not apply to deductions authorized on account of the Soldiers' Home. *Act of Mar. 16, 1896 (29 Stat. 60), making appropriations for the support of the Army.*

The additional pay for length of service, and part of the reenlistment pay, provided for by R. S. 1281, 1282, were, by those sections, to be retained until discharged from the service. A provision for retaining part of the monthly pay for the first year of enlistment, contained in sec. 1, act of June 16, 1890 (26 Stat. 157), was repealed by act of Feb. 12, 1895 (28 Stat. 655).

Deductions from pay on account of the Soldiers' Home were authorized by R. S. 4819, but so much of that section as pertained to said deduction was repealed by a provision of the act of June 12, 1906 (34 Stat. 242), a similar provision being found in the act of May 11, 1908 (35 Stat. 110).

Notes of Decisions.

Retained pay.—Decisions under prior statutes, see U. S. v. Kingsley (1891), 11 Sup. Ct. 286, 287, 138 U. S. 87, 34 L. Ed. 896;

Kingsley v. U. S. (1889), 24 Ct. Cl. 219; (1890) 19 Op. Atty. Gen. 567, 616.

1610. Pay withheld to discharge debts to the United States.—No money shall be paid to any person for his compensation who is in arrears to the United States until he has accounted for and paid into the Treasury all sums for which he may be liable. In all cases where the pay or salary of any person is withheld in pursuance of this section, the accounting officers of the Treasury, if required to do so by the party, his agent or attorney, shall report forthwith to the Solicitor of the Treasury the balance due; and the Solicitor shall, within sixty days thereafter, order suit to be commenced against such delinquent and his sureties. *R. S. 1766.*

Notes of Decisions.

Arrearages for which pay can be withheld.—The section applies only to cases where the party is liable to the United States, and can not be extended to a case of payment in good faith for a service rendered made in mistake of law. Hedrick v. U. S. (1880), 16 Ct. Cl. 88.

This section does not require that, before payment is withheld, the officer shall be adjudged in arrears in a suit brought against him. (1881) 17 Op. Atty. Gen. 30.

Where money was paid by a United States marshal, under a mistake of fact, to a person who subsequently became an officer in the postal service, the latter is in arrears to the United States for the amount so paid, and it may be set off

against his compensation as such officer. (1884) 17 Op. Atty. Gen. 677.

Discharge of liability.—The liability of an acting collector of internal revenue for money taken and appropriated by him is not discharged by the Treasury Department charging the loss to the former collector; but the amount so appropriated may be set off against the acting collector's compensation. Hiland v. The U. S. (1885), 20 Ct. Cl. 410.

Person indebted to United States.—Sureties of a delinquent or defaulting principal obligor in a custom house bond are not liable to detention of moneys due them; the phrase "who is in arrears to the United States," contained in this section,

applying only to persons who, having previous transactions of a pecuniary nature with the Government, are found upon the settlement of those transactions to be in arrears. (1836) 3 Op. Atty. Gen. 52.

This section does not apply to a clerk in the Government service who is a judgment debtor of the United States, but only to one who has received Government moneys to be disbursed or covered into the Treasury. (1906) 26 Op. Atty. Gen. 77.

Pay which can be withheld.—A balance due to a deceased military officer upon his pay-account becomes on his death part of his personal estate and may be set off by the accounting officers upon an indebtedness due from him to the Government; but money granted to his widow by statute can not be. *Mumford v. U. S.* (1896), 31 Ct. Cl. 210.

Public debtors in the naval service of the United States are entitled to receive the rations allowed them by law, or the amount in money for which they may be commuted, notwithstanding this section. (1831) 2 Op. Atty. Gen. 420.

Where an Army officer assigned his pay accounts in payment of certain indebtedness, the Paymaster General could decline to pay the accounts, for the reason that on the maturity thereof the officer was in arrears to the United States. (1881) 17 Op. Atty. Gen. 30.

Discharge of sureties.—This section forms no part of the contract with the officer's sureties, so as to discharge their liability when payments are made to an

officer in arrears. *U. S. v. Potter* (C. C. 1879), Fed. Cas. No. 16,076.

Where an officer receiving a salary from the United States is surety for a defaulter, the continuance of the payment of his salary is no relinquishment of the claim against him as surety. *U. S. v. Beattie* (D. C. 1829), Fed. Cas. No. 14,554.

Liability for failure to withhold pay.—An Army paymaster, who paid the assignee of an officer who he knew was in arrears to the Government, is liable for the amount of such payment. (1882) 17 Op. Atty. Gen. 425.

Set-off.—It is the duty of the accounting officers in proper cases to set off one demand against another, where the Government is both debtor and creditor of the same party. *Taggart v. U. S.* (1881), 17 Ct. Cl. 322; *George Howes & Co. v. U. S.* (1889), 24 Ct. Cl. 170; *Labadie v. U. S.* (1898), 33 Ct. Cl. 476; *The Henry* (1900), 35 Ct. Cl. 393.

Basis of right.—The right of set-off, where the Government is both debtor and creditor, is established and provided for by this section and by section 355, ante; but it exists independently thereof, and is founded upon section 329, ante. *Taggart v. U. S.* (1881), 17 Ct. Cl. 322.

Attorneys' fees.—The treasury regulations for withholding fees of attorneys securing the award of a claim do not authorize the payment of such fees where the amount of the award is set off against an indebtedness due the United States from the claimant. *Pennebaker v. U. S.* (1894), 29 Ct. Cl. 35.

1611. Pay withheld to satisfy a judgment.—The pay of officers of the Army may be withheld under section seventeen hundred and sixty-six of the Revised Statutes on account of an indebtedness to the United States admitted or shown by the judgment of a court, but not otherwise unless upon a special order issued according to the discretion of the Secretary of War. *Act of July 16, 1892* (27 Stat. 177).

For *R. S.* 1766, see 1610, ante.

Notes of Decisions.

Discretion of Secretary.—When the second comptroller reports an officer indebted to the United States, it is a matter wholly within the discretion of the Secretary of War whether to order a stoppage of pay or not. *In re Billings* (1888), 23 Ct. Cl. 166.

The power given to the Secretary of War to order a stoppage of pay against a delinquent officer is exclusive and discretionary, but is not to be asserted against an officer acting under an order which he was bound to obey. *In re Smith* (1889), 24 Ct. Cl. 209.

1612. Amount of rations purchased on credit deducted from pay.—The amount due from any officer for rations purchased on credit, or for any article designated by the inspectors-general of the Army and purchased on credit from commissaries of subsistence, shall be deducted from the payment made to such officer next after such purchase shall have been reported to the Paymaster-General. *R. S.* 1299.

1613. Amount of stores purchased on credit deducted from pay.—The amount due from any enlisted man for articles designated by the inspectors-general of

the Army, and sold to him on credit by commissaries of subsistence, shall be deducted from the payment made to him next after such sale shall have been reported to the Paymaster-General. *R. S. 1300.*

For rules respecting sales on credit see pars. 1242, 1244, and 1249-1251, Army Regulations of 1913.

1614. Amount of tobacco purchased on credit deducted from pay.—The amount due from any enlisted man for tobacco sold to him at cost prices by the United States shall be deducted from his pay in the manner provided for the settlement of clothing accounts. *R. S. 1301.*

1615. Cost of damages deducted from pay.—The cost of repairs or damages done to arms, equipments, or implements shall be deducted from the pay of any officer or soldier in whose care or use the same were when such damages occurred, if said damages were occasioned by the abuse or negligence of said officer or soldier. *R. S. 1303.*

1616. Deduction of pay to reimburse deficiencies in supplies or accounts.—In case of deficiency of any article of military supplies, on final settlements of the accounts of any officer charged with the issue of the same, the value thereof shall be charged against the delinquent and deducted from his monthly pay, unless he shall show to the satisfaction of the Secretary of War, by one or more depositions setting forth the circumstances of the case, that said deficiency was not occasioned by any fault on his part. And in case of damage to any military supplies, the value of such damage shall be charged against such officer and deducted from his monthly pay, unless he shall, in like manner, show that such damage was not occasioned by any fault on his part. *R. S. 1304.*

Any officer who suffers military stores to be lost, spoiled, or damaged was punishable therefor under Article of War 15, *R. S. 1342*, art. 15, which said article was superseded by new Article of War 83, ch. 52, post.

Provisions relating to the making of property returns by officers were made by act of Mar. 29, 1894, ante, 807.

Provisions relating to the taking and effect of oaths and affidavits on settlement of officers' accounts were made by *R. S. 225*, ante, 46, 810.

Notes of Decisions.

Officer acting under orders.—The power given to the Secretary of War to order a stoppage of pay against a delinquent officer is exclusive and discretionary, but is not to be asserted against an officer acting under an order which he is bound to obey, and as to which he is expressly relieved from personal liability. Such an abuse of power would not tend to preserve but to subvert military order and discipline. The refusal of the Secretary of War to stop an officer's pay is not a decision upon the merits; it will not bind the Government nor preclude the Comptroller from causing a suit to be brought against the officer; it merely determines that the officer is so far without fault that the harsh and summary remedy of stopping his pay should not be resorted to. *Smith v. U. S.*, 24 Ct. Cls. 209, 215; *Billings v. U. S.*, 23 id. 166, 175.

Stoppage.—A stoppage differs from a fine or forfeiture, in that the latter is imposed as punishment for an offense, while the former is a means of reimbursement or a "charge on account" to make good a loss. A stoppage can not therefore, in the absence of a statute or regulation authorizing it legally be imposed as a punishment for an offense. But it is entirely legal to stop against a soldier's pay, under the Army Regulations, an amount required to reimburse the United States for loss on account of damage done to public property, while at the same time bringing the soldier to trial by court-martial for the offense involved. *Gratiot v. U. S.*, 15 Pet. 336; *McKnight v. U. S.*, 98 U. S. 180.

1617. Certificate of nonindebtedness prerequisite for final payment of accountable officer of volunteers.—That officers who at any time were accountable or

responsible for public property shall be required, before final payment is made to them on discharge from the service, to obtain certificates of nonindebtedness to the United States from only such of the bureaus of the War Department to which the property for which they were accountable or responsible pertains, and the certificate from the Chief of the Division of Bookkeeping and Warrants, Treasury Department, and such certificates, accompanied by the affidavits of officers, of nonaccountability or nonresponsibility to other bureaus of the War Department, certified to by the commanding officer of the regiment or independent organization, shall warrant their final payment: *Provided*, That officers who have not been responsible at any time for public property shall be required to make affidavit of that fact, certified to by their commanding officers, which shall be accepted as sufficient evidence to warrant their final payment on their discharge from the service: *Provided further*, That mustering officers are empowered to administer oaths in all matters pertaining to the muster out of volunteers. *Sec. 2, act of Jan. 12, 1899 (30 Stat. 784).*

No provision for a volunteer army appears in the national defense act as amended by act of June 4, 1920 (41 Stat. 759).

This was part of an act "granting extra pay to officers and enlisted men of United States Volunteers" and by its terms may be regarded as applicable to officers and enlisted men in the volunteer service at any time thereafter, as well as to those actually in the service at the time of its passage.

1618. Pay withheld from an officer for preventing social intercourse between officers and enlisted men.—*Provided*, That no part of the funds herein appropriated shall be expended in payment of the salary of any officer of the Army of the United States who shall issue or cause to be issued any order, written or verbal, preventing social intercourse between officers and enlisted men of said Army while not on military duty when such order was not authorized by law or general Executive order: *Provided further*, That this limitation shall not apply to an officer who shall have acted in obedience to the mandates of his superior. *Act of June 5, 1920 (41 Stat. 976), making appropriations for the support of the Army.*

1619. Stoppage of pay.— * * * *Provided*, That hereafter pay and allowances shall not accrue to a soldier under sentence of dishonorable discharge, during such period as the execution of the sentence of discharge may be suspended under authority of the Act of Congress approved April twenty-seventh, nineteen hundred and fourteen, and pay which has heretofore been forfeited under such suspended sentence shall not be held to have accrued to the Soldiers' Home under the operation of section forty-eight hundred and eighteen, Revised Statutes, but shall be covered back into the Treasury of the United States. *Act of Mar. 4, 1915 (38 Stat. 1065), making appropriations for the support of the Army.*

The provision of act of Apr. 27, 1914 (38 Stat. 354), mentioned in this section, was superseded by A. W. 52, ch. 52, post.

R. S. 4818, also mentioned in this section, is set forth, 1957, 1958, post.

1620. Repayment of detained pay.— * * * *Provided*, That hereafter sums known as detained pay, which have already been or may hereafter be withheld from the monthly pay of enlisted men of the Army in obedience to court-martial sentences, shall, when repaid, become a charge against the fund "pay of the Army" for the year in which said enlisted men have been or may be discharged. *Act of Aug. 6, 1894 (28 Stat. 236), making appropriations for the support of the Army.*

1621. Deposits of savings.—Any enlisted man of the Army may deposit his savings, in sums not less than five dollars, with any army paymaster, who shall furnish him a deposit book, in which shall be entered the name of the paymaster and of the soldier, and the amount, date, and place of such deposit. The amount so deposited shall be accounted for in the same manner as other public funds, and shall be deposited in the Treasury of the United States and kept as a separate fund, known as pay of the Army deposit fund, repayment of which to the enlisted man on discharge from the service shall be made out of the fund created by said deposits, and shall not be subject to forfeiture by sentence of court-martial, but shall be forfeited by desertion, and shall not be permitted to be paid until final payment on discharge, or to the heirs or representatives of a deceased soldier, and that such deposits be exempt from liability for such soldier's debts: *Provided*, That the Government shall be liable for the amount deposited to the person so depositing the same. *R. S. 1365, as amended by act of June 12, 1906 (34 Stat. 246).*

This section, as enacted in the Revised Statutes, contained, after the first sentence thereof, the words, "The money so deposited shall be accounted for in the same manner as other public funds, and shall pass to the credit of the appropriation for the pay of the Army." Said provision was changed to read as set forth here.

Notes of Decisions.

Marine Corps.—This section has no application to the Marine Corps, and the enlisted men of that corps have not the right or privilege of making such deposits with a paymaster of that branch of the service. (1904) 25 Op. Atty. Gen. 190.

Forgery of certificate.—A certificate issued by an Army paymaster to an enlisted

man, acknowledging the receipt of money deposited under this section, held a certificate of deposit, and an obligation or security of the United States within secs. 147, 148, Crim. Code. *Neall v. U. S.* (1902), 118 Fed. 690, 56 C. C. A. 51.

1622. Interest on deposits of savings.—For any sums not less than fifty dollars so deposited for the period of six months, or longer, the soldier, on his final discharge, shall be paid interest at the rate of four per centum per annum. *R. S. 1306.*

* * * and section thirteen hundred and six of the Revised Statutes is hereby so amended as to strike out the word "fifty," where it occurs in said section, and in lieu thereof inserting the word "five;" * * * *Act of Mar. 3, 1883 (22 Stat. 456), amending R. S. 1306.*

1623. Regulations for the deposit of savings.—The system of deposits herein established shall be carried into execution under such regulations as may be established by the Secretary of War. *R. S. 1307.*

1624. Compulsory saving of pay.—That in case one-half of an enlisted man's monthly pay is not allotted, regulations to be made by the Secretary of War and the Secretary of the Navy, respectively, may require, under circumstances and conditions as may be prescribed in such regulations, that any proportion of such one-half pay as is not allotted shall be deposited to his credit, to be held during such period of his service as may be prescribed. Such deposit shall bear interest at the same rate as United States bonds bear for the same period, and, when payable, shall be paid principal and interest to the enlisted man, if living, otherwise to any beneficiary or beneficiaries he may have designated, or if there be no such beneficiary, then to the person or persons who, under the laws of the State of his residence, would be entitled to his personal property in case of

intestacy. *Sec. 203, added to the act of Sept. 2, 1914 by sec. 2, act of Oct. 6, 1917 (40 Stat. 403), as amended by sec. 5, act of June 25, 1918 (40 Stat. 610).*

Act of Oct. 6, 1917 (40 Stat. 403), provided for semiannual interest at the rate of four per centum per annum.

1625. Repayment of compulsory savings.—That there shall be set aside as a separate fund in the Treasury, to be known as the military and naval pay deposit fund, all sums held out of pay as provided by section two hundred and three of this Act. Such fund, including all additions, is hereby made available for the payment of the sums so held and deposited, with interest, as provided in section two hundred and three, and the amount necessary to pay interest is hereby appropriated. *Sec. 21, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 400).*

1626. Committee on readjustment.— * * * *And provided further,* That a special committee, to be composed of five Members of the Senate, to be appointed by the Vice President, and five Members of the House of Representatives, to be appointed by the Speaker of the House of Representatives, shall make an investigation and report recommendations to their respective Houses not later than the first Monday in January, 1922, relative to the readjustment of the pay and allowances of the commissioned and enlisted personnel of the several services herein mentioned. *Sec. 13, act of May 18, 1920 (41 Stat. 604).*

1627. Rates of pay of officers.—The officers of the Army shall be entitled to the pay herein stated after their respective designations:

The General: thirteen thousand five hundred dollars a year.

Lieutenant General: eleven thousand dollars a year.

* * * * *

Aid to major-general: two hundred dollars a year, in addition to pay of his rank.

Aid to brigadier-general: one hundred and fifty dollars a year, in addition to pay of his rank.

* * * * *

Ordnance store-keeper at Springfield armory: two thousand five hundred dollars a year.

All other store-keepers: two thousand dollars a year. *R. S. 1261.*

That hereafter the annual pay of officers of the Army of the several grades herein mentioned shall be as follows: Major-general, eight thousand dollars; brigadier-general, six thousand dollars; colonel, four thousand dollars; lieutenant-colonel, three thousand five hundred dollars; major, three thousand dollars; captain, two thousand four hundred dollars; first lieutenant, two thousand dollars; second lieutenant, one thousand seven hundred dollars. * * * *Act of May 11, 1908 (35 Stat. 108), making appropriations for the support of the Army.*

Many provisions of R. S. 1261 were rendered inoperative or superseded by subsequent statutes, which abolished certain of the grades or offices mentioned therein, changed the rates of pay of others, or made other provisions relating to pay of officers.

The rates of pay fixed by that section for major-general, brigadier general, colonel, lieutenant colonel, major, captain, first lieutenant, and second lieutenant, were increased by provisions of act of May 11, 1908, as here set forth, and temporarily of all officers below the grade of general officer by 1628, post.

Thirteen ordnance storekeepers, one at Springfield Armory to have the rank of major of Cavalry, the others to have the rank of captain of Cavalry, were authorized by R. S. 1159, but the grade was not included in the reorganization of the Ordnance Department by sec. 5, act of June 23, 1874 (18 Stat. 245), and therefore, by sec. 7 of that act, it ceased to exist on becoming vacant. Military storekeepers in the Quartermaster's De-

partment, not exceeding 16, with the rank of captain of Cavalry, were authorized by R. S. 1132, but sec. 2, act of Mar. 3, 1875 (18 Stat. 388), provided that no more appointments should be made in the grade, and that it should cease as soon as it should become vacant. See also 708, ante.

A provision of sec. 2, act of June 6, 1900 (31 Stat. 655), that the senior major-general of the line commanding the Army should have the rank, pay, and allowances of a Lieutenant General, and his personal staff the rank, pay, and allowances authorized for the staff of a Lieutenant General, was superseded by the inclusion of the Lieutenant General in the composition of the Army, by sec. 1, act of Feb. 2, 1901.

For limitation on detail, rating, or assignment with advanced rank, see 2311, post.

Notes of Decisions

Right to pay in general.—The pay of officers of the Army is prescribed by statute, and so long as a person is an officer of the Army he is entitled to receive the pay belonging to the office, unless he has forfeited it under some provision of law, whether he has actually performed military service or not. (1869) 13 Op. Atty. Gen. 104. Hence it would follow that a lieutenant, who, having written a letter to the Secretary of War which, though not intended as such, was considered a resignation by that department, was accordingly dropped from the rolls, but afterwards restored by the President to his station and rank, would be entitled to be paid as lieutenant during the time he was kept out of service. (1841) 3 Op. Atty. Gen. 641. But an officer can not maintain an action for his salary unless he has a legal title to the office. Mere occupancy is not sufficient. *Runkle v. U. S.* (1884), 19 Ct. Cl. 396.

Public policy prohibits any attempt by unauthorized agreement with an officer of the Army, under guise of a condition or otherwise, to deprive him of the right to pay given by statute. *U. S. v. Andrews* (1916), 240 U. S. 90.

Mounted pay.—A mounted officer is one who, by statute, regulations, or Army organization, is "required" to be mounted at his own expense. In re Harrold (1888), 23 Ct. Cl. 295. Mounted pay is not synonymous with mounted service. *Crosley v. U. S.* (1903), 38 Ct. Cl. 82. It is

not an allowance, but pay proper. The officer receives it, whether he is actually mounted or not. *Richardson v. U. S.* (1903), 38 Ct. Cl. 182.

Deprivation of pay.—It requires the decision of a court-martial to deprive an officer of his pay and emoluments. *Carrington v. U. S.* (1911), 46 Ct. Cl. 270.

The mere fact that an officer is under charges does not deprive him of his pay and allowances. Such forfeiture can only be imposed by the sentence of a court-martial. *Walsh v. U. S.* (1908), 43 Ct. Cl. 225.

Where an officer is awaiting trial under waiting orders issued by authority of the War Department, he is entitled to the emoluments of his office, including commutation for quarters. *Carrington v. U. S.* (1911), 46 Ct. Cl. 279.

Decisions under prior laws.—For decisions under prior statutes which have been superseded by subsequent laws, see the following cases: Assistant commissaries. *U. S. v. Morrison* (1877), 96 U. S. 232, 233, 24 L. Ed. 688; *Morrison v. U. S.* (1877), 13 Ct. Cl. 1; *Lopez v. Same* (1909), 44 Ct. Cl. 220; (1881) 17 Op. Atty. Gen. 43. Battalion and regimental paymasters. (1825) 1 Op. Atty. Gen. 704. Ordnance storekeepers. *Grealish v. U. S.* (1885), 20 Ct. Cl. 486. Paymasters. *Wetmore v. U. S.* (1836), 10 Pet. 647, 652, 9 L. Ed. 567; *U. S. v. Gwynne* (C. C. 1836), Fed. Cas. No. 15,272.

1628. Increase of pay of officers.—That, commencing January 1, 1920, commissioned officers of the Army, Navy, and Marine Corps, and Public Health Service shall be paid, in addition to all pay and allowances now allowed by law, increases at rates per annum as follows: Colonels in the Army and Marine Corps, captains in the Navy, and assistant surgeons general in the Public Health Service, \$600; lieutenant colonels in the Army and Marine Corps, commanders in the Navy, and senior surgeons in the Public Health Service, \$600; majors in the Army and Marine Corps, lieutenant commanders in the Navy, and surgeons in the Public Health Service, \$840; captains in the Army and Marine Corps, lieutenants in the Navy, and passed assistant surgeons in the Public Health Service, \$720; first lieutenants in the Army and Marine Corps, lieutenants (junior grade), acting assistant surgeons and acting assistant

dental surgeons in the Navy, and assistant surgeons in the Public Health Service, \$600; second lieutenants in the Army and Marine Corps, and ensigns in the Navy, \$420: * * * *Sec. 1, act of May 18, 1920 (41 Stat. 601-602).*

That the provisions of sections 1, * * * 4, 5, * * * of this Act shall remain effective until the close of the fiscal year ending June 30, 1922, unless sooner amended or repealed: * * * *Sec. 13, act of May 18, 1920 (41 Stat. 604).*

Sec. 4 of the above act is found 1672, post, and sec. 5 in 919, ante.

1629. Pay and allowances not reduced.—That nothing contained in this Act shall operate to reduce the pay or allowances of any officer or enlisted man on the active or retired list: * * * *Sec. 14, act of May 18, 1920 (41 Stat. 604).*

That nothing herein contained shall be construed so as to reduce the pay or allowance now authorized by law for any officer or enlisted man of the Army; and all laws or parts of laws inconsistent with the provisions of this Act are hereby repealed. *Act of May 11, 1908 (35 Stat. 110), making appropriations for the support of the Army.*

1630. Back pay and allowances.—That nothing contained in this Act shall be construed as granting any back pay or allowances to any officer or enlisted man whose active service shall have terminated subsequent to December 31, 1919, and prior to the approval of this Act, unless such officers or enlisted men shall have been recalled to active service or shall have been reenlisted prior to the approval of this Act. *Sec. 9, act of May 18, 1920 (41 Stat. 603).*

1631. Pay of graduated cadets appointed second lieutenants.—That every cadet who has heretofore graduated or may hereafter graduate at the West Point Military Academy, and who has been or may hereafter be commissioned a second lieutenant in the Army of the United States, under the laws appointing such graduates to the Army, shall be allowed full pay as second lieutenant from the date of his graduation to the date of his acceptance of and qualification under his commission and during his graduation leave, in accordance with the uniform practice which has prevailed since the establishment of the Military Academy. *Act of Dec. 20, 1886 (24 Stat. 351).*

1632. Pay and allowances of generals and lieutenant generals during the World War.— * * * *Provided,* That the pay of the grades of general and lieutenant general shall be \$10,000 and \$9,000 a year, respectively, with allowances appropriate to said grades as determined by the Secretary of War: * * * *Sec. 3, act of Oct. 6, 1917 (40 Stat. 411).*

But see 2325, post.

1633. Pay and allowances of officers of Philippine Scouts.— * * * The pay and allowances of provisional officers of native organizations shall be those authorized for officers of like grades in the Regular Army. * * * *Sec. 36, act of Feb. 2, 1901 (31 Stat. 757).*

But see 2268, post.

1634. No increase of pay on account of brevet rank.—Brevets conferred upon commissioned officers shall not entitle them to any increase of pay. *R. S. 1264.*

Notes of Decisions.

Brevet pay.—Since sec. 9, act of Mar. 3, 1865 (13 Stat. 488), embodied in this section, officers of the Army have not been en-

titled to the pay and emoluments of brevet rank, though assigned to duty as such by the President, and having command ac-

cordingly. *Pope v. U. S.* (1884), 19 Ct. Cl. 693.

Decisions under prior laws, see *U. S. v. Vinton* (C. C. 1836), *Fed. Cas. No. 16,624*; *U. S. v. Freeman* (C. C. 1845), *Fed. Cas. No. 15,163*; *Hunt v. U. S.* (1870), 6 Ct. Cl.

8; (1821), 1 Op. Atty. Gen. 525; (1822) 1 Op. Atty. Gen. 547; (1822) 1 Op. Atty. Gen. 564; (1829) 2 Op. Atty. Gen. 223; (1834) 2 Op. Atty. Gen. 646; (1835) 2 Op. Atty. Gen. 697; (1836) 3 Op. Atty. Gen. 83; (1853) 6 Op. Atty. Gen. 211.

1635. Increase in pay for exercising higher command.—That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised: *Provided*, That a rate of pay exceeding that of a brigadier-general shall not be paid in any case by reason of such assignment: * * * *Sec. 7, act of Apr. 26, 1898 (30 Stat. 365)*.

The appropriations for additional pay, pursuant to this section, in the Army appropriation act for the fiscal year 1901, contained a proviso that no part thereof be used for pay of officers assigned to higher command than their rank in the Army, unless such service should be continuous for a period of not less than three months. *Act of May 26, 1900 (31 Stat. 211)*.

Provisions relating to readjustment of disallowances or stoppages on account of payments for exercise of higher command between Apr. 26, 1898, and Mar. 18, 1907, in the Army appropriation act for the fiscal year 1912, act of Mar. 3, 1911 (36 Stat. 1039), are omitted, as temporary merely.

Notes of Decisions.

Time of war, and troops operating against an enemy.—A naval officer's services in the waters of the Philippines held rendered "in time of war," within this section. *Thomas v. U. S.* (1903), 39 Ct. Cl. 1.

An officer commanding a vessel operating against insurgents during an insurrection held entitled to the benefit of this section. *Leigh v. U. S.* (1908), 43 Ct. Cl. 374.

The phrase "troops operating against an enemy," as used in this section, was intended to apply to all instances where the troops of the United States are assembled into separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain. If the operations of the troops are with the direct object of assisting in the military measures of the Government for subduing the forces of Spain, they can be considered as operating against an enemy, although such operations may not be direct and are in the nature of necessary component steps, though remote, in one great military objective. Any troops assembled at camps in the United States for war purposes can properly be considered as operating against an enemy, although their present service is confined to the ordinary routine of camp life. (1898) 22 Op. Atty. Gen. 95.

Officers exercising, under assignment in orders, a command above that pertaining to their grade, in connection with the Army of the United States, if performing no other

service of a domestic nature, but held in readiness to resume hostilities, are entitled to the increased pay and allowance provided for by this section. (1898) 22 Op. Atty. Gen. 258.

Command.—The term "command," in this section, refers to the body of troops which constitutes a command. *Humphreys v. U. S.* (1903), 38 Ct. Cl. 689.

Assignment to command and order therefor.—The accounting officers may inquire whether an order of assignment was carried into effect according to law. *Glenn v. U. S.* (1902), 37 Ct. Cl. 254.

The intention of this section is to allow to officers, who, under proper assignments, assume higher commands and greater responsibilities, a higher rate of pay; but this increased pay is only allowed in cases where an assignment by order is necessary. *Walker v. U. S.* (1907), 43 Ct. Cl. 1. So, where an officer was assigned to a higher command by his corps commander, he can not recover the pay of the higher grade he exercised, where such command devolved upon him by seniority without the aid of the order assigning him thereto. *U. S. v. Mitchell* (1907), 27 Sup. Ct. 463, 465, 205 U. S. 161, 51 L. Ed. 752, reversing *Mitchell v. U. S.* (1905), 41 Ct. Cl. 36. It extends only to cases where an order is necessary to impose the burden of the higher command, and not to cases where a command temporarily devolves upon an officer without an order. And an assignment made merely to increase an officer's pay is un-

authorized. *Humphreys v. U. S.* (1903), 38 Ct. Cl. 689.

Where the Secretary of War refused to confirm the assignment, his refusal was an annulment of the regimental order, and of itself deprived the officer from receiving the pay of the higher grade. *Van Leer v. U. S.* (1913), 48 Ct. Cl. 145.

Staff officers.—A staff officer does not exercise a command; and an officer assigned to staff duty can not be regarded as exercising a command above that pertaining to his grade, under this section. *Truitt v. U. S.* (1903), 38 Ct. Cl. 398.

Brigade commander.—An officer assigned to command a brigade held entitled to the pay of a brigadier general. *Glenn v. U. S.* (1902), 37 Ct. Cl. 254.

Marine Corps officers.—A lieutenant colonel of the Marine Corps, assigned to the command of a so-called regiment, is not an officer having a command above that pertaining to his grade, and is not entitled to the pay of a colonel in the Marine Corps. *Berryman v. U. S.* (1908), 43 Ct. Cl. 397.

First lieutenants commanding company.—This section extends to a first lieutenant assigned to command another company than his own. *Walker v. U. S.* (1907), 43 Ct. Cl. 1.

Temporary absence from command.—The temporary absence of an officer from the higher command does not deprive him of the higher pay. *Leigh v. U. S.* (1908), 43 Ct. Cl. 374.

1636. Principal assistant, Ordnance Bureau.—Section twelve hundred and seventy-nine is amended by adding at the end thereof the following words: " * * * The principal assistant in the Ordnance Bureau shall receive a compensation, including pay and emoluments, not exceeding that of a major of ordnance." *Act of Feb. 27, 1877 (19 Stat. 243), amending R. S. 1279.*

The term "Ordnance Bureau" refers to the Ordnance Department or is synonymous with the Office of the Chief of Ordnance. Under the above law it was the custom to detail a captain to serve in Washington, giving him the pay and allowances of a major. But see 2311, post.

1637. Longevity pay.—There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service. *R. S. 1262.*

Notes of Decisions.

Retroactive effect of section.—See *Davison v. U. S.* (1908), 43 Ct. Cl. 308.

"Service."—The word "service," as used in this section, means military service. *U. S. v. La Tourrette* (1894), 14 Sup. Ct. 422, 423, 151 U. S. 572, 38 L. Ed. 274. It means actual service performed under color of office, without regard to defects in the title to the office. The reward which the statutes intend is for long-continued actual service, and it matters not whether an officer serves as such de jure or de facto. *Bennett v. U. S.* (1884), 19 Ct. Cl. 379; *Palen v. U. S.* (1884), 19 Ct. Cl. 369; *Gould v. U. S.* (1884), 19 Ct. Cl. 593.

A person employed by the council of administration at an Army post, prior to sec. 7, act of Mar. 2, 1867 (14 Stat. 423), to officiate as chaplain was in the "service," and, if afterwards regularly commissioned under that act, the period of his service under the prior appointment should be included in computing his longevity pay. *U. S. v. La Tourrette* (1894), 14 Sup. Ct. 422, 423, 151 U. S. 572, 38 L.

Ed. 274. Contra, see *La Tourrette v. U. S.* (1891), 26 Ct. Cl. 296. This decision by the Court of Claims seems afterwards to have been overruled and the claim allowed. See 28 Ct. Cl. 566. See further (1881) 17 Op. Atty. Gen. 152.

Retired officers.—The statute makes no distinction between officers on the active and retired list. Longevity pay of officers on the retired list is to be computed as if they remained on the active list, subject to the general deduction of one-fourth directed by 1648, post. *Tyler v. U. S.* (1880), 16 Ct. Cl. 223. *U. S. v. Tyler* (1881), 105 U. S. 244, 246, 26 L. Ed. 985. Contra, see *Marshall v. U. S.* (1888), 8 Sup. Ct. 520, 124 U. S. 391, 31 L. Ed. 475. See 1045 and 1646, post.

Contract surgeon.—A contract surgeon is not an officer within the provisions of R. S. 1262, or the act of June 30, 1882, granting longevity pay. *Yemans v. U. S.* (1917), 52 Ct. Cl. 388.

National Guard drafted into Federal service.—The provision in sec. 111, act, of June 8, 1916 (39 Stat. 211), that officers

and enlisted men of the National Guard drafted into the service of the United States shall have the same pay and allowances as officers and enlisted men of the Regular Army of the same grade and the same prior service, construed to mean the same length of service in the Organized Militia or National Guard. (1917) 24 Comp. Dec. 120.

Officers so drafted are entitled to count all service on the active list in the Organized Militia or National Guard, whether as officers or enlisted men, for the purpose of computing longevity pay. Id.

Enlisted men so drafted are entitled to count all continuous service on the active list in the Organized Militia or National Guard for the purposes of continuous-service pay from and after Aug. 5, 1917; but service on the reserve list, whether under State laws or under sec. 69 of the act of June 3, 1916, may not be so counted, except to determine the continuity of active service. Id.

The right to count prior State service on the active list in the National Guard or Organized Militia for the purpose of the longevity increase of pay remains with officers of the National Guard entitled thereto whenever in the Federal service without regard to the continuity of such service. (1918) 25 Comp. Dec. 66.

Volunteer service.—Under sec. 15, act of July 5, 1838 (5 Stat. 258) which provided that every commissioned officer of the line or staff, exclusive of general officers, shall be entitled to receive one additional ration per diem for every five years he may have served or shall serve in the Army of the United States, in connection with sec. 1, act of Mar. 2, 1867 (14 Stat. 434), which provided that "in computing the length of service of any officer of the Army, in order to determine what allowance and payment of additional or longevity ration he is entitled to," there should be taken into consideration his service as a commissioned officer either in the Regular Army or, since April 19, 1861, in the volunteer service, it was held that service in the volunteer forces during the Mexican War could not

be included in computing his right to such longevity ration. *U. S. v. Sweeny* (1895), 15 Sup. Ct. 608, 157 U. S. 281, 39 L. Ed. 702.

Militia officers.—An officer of State militia is not entitled to longevity pay, under this section, for the period during which he was an officer of such militia, for service with his organization with a part of the Regular Army, at an encampment authorized by 2574, post. *Bowie v. U. S.* (1909), 45 Ct. Cl. 42.

Effect of discharge from service.—The discharge of an officer of the Army does not take effect, so as to relieve the Government from its obligations, until he is notified of the fact and actually discharged from service. *Gould v. U. S.* (1884), 19 Ct. Cl. 593.

Computation.—Since the passage of sec. 1641, post, the method of computing current year, under this section, has been as prescribed thereby. *Plummer v. U. S.* (1912), 32 Sup. Ct. 467, 469, 224 U. S. 137, 56 L. Ed. 607, reversing (1909), 45 Ct. Cl. 614. This section was not affected in principle by 1641, post, which simply provides a numerical measure of compensation. *La Tourette v. U. S.* (1891), 26 Ct. Cl. 296.

The method of computing longevity pay is not by taking one-tenth of the officer's fixed annual pay, but one-tenth of his "current yearly pay"; i. e., his second longevity pay will include 10 per cent of his first longevity pay, etc., subject, however, to the provision of 1838, post. *Tyler v. U. S.* (1890), 16 Ct. Cl. 223.

Longevity pay.—Longevity pay is founded upon the equivalent of increased judgment and capacity acquired by the experience of continued service. *Brown v. U. S.*, 18 Ct. Cls. 545.

Acts authorizing longevity pay are remedial statutes, and officers are entitled to a liberal interpretation of them, the language used being given as broad a meaning as Congress may be presumed to have intended. *Hendee v. U. S.*, 22 Ct. Cls. 134; 19 id. 153.

See also notes to 1641 and 1643, post.

1638. Maximum rate of longevity pay.—The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law. *R. S. 1263.*

See notes to 1639, post.

1639. Maximum pay for colonel, lieutenant-colonel, and major.—In no case shall the pay of a colonel exceed five thousand dollars a year; the pay of a lieutenant-colonel exceed four thousand five hundred dollars a year, or the pay of a major exceed four thousand dollars a year. *R. S. 1267, as amended by act*

of May 11, 1908 (35 Stat. 108), making appropriations for the support of the Army.

This section, as enacted in the Revised Statutes, was as follows:

"In no case shall the pay of a colonel exceed four thousand five hundred dollars a year, or the pay of a lieutenant-colonel exceed four thousand dollars a year."

For temporary increase in these grades, see 1628, ante.

Notes of Decisions.

Retired pay.—A retired officer is only entitled, by 1648, post, to receive 75 per cent of the sum which he was entitled to receive upon the active list at the time of his retirement. *Marshall v. U. S.* (1888), 124

U. S. 391, affirming (1885), 20 Ct. Cl. 370; affirmed on rehearing (1888), 131 *U. S.* 391; *Roberts v. U. S.* (1874), 10 Ct. Cl. 283.

1640. Service as cadet not to be counted toward longevity.—That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy or to the Naval Academy shall not be counted in computing for any purpose the length of service of any officer of the Army. *Sec. 6, act of Aug. 24, 1912* (37 Stat. 594), making appropriations for the support of the Army.

1641. Service in the Navy included in computing longevity pay.—For * * * additional pay to officers for length of service, to be paid with their current monthly pay, and the actual time of service in the Army or Navy, or both, shall be allowed all officers in computing their pay: *Provided*, That from and after the first day of July, eighteen hundred and eighty-two, the ten per centum increase for length of service allowed to certain officers by section twelve hundred and sixty-two of the Revised Statutes shall be computed on the yearly pay of the grade fixed by sections twelve hundred and sixty-one and twelve hundred and seventy-four of the Revised Statutes; * * * *Act of June 30, 1882* (22 Stat. 118), making appropriations for the support of the Army.

R. S. 1261 and 1262, mentioned in this provision, prescribing rates of pay for various grades of officers, are set forth, 1627, 1637, ante, and R. S. 1274, also mentioned therein, providing that retired officers should receive 75 per cent of the pay of the rank upon which they were retired, is set forth, 1648, post.

Notes of Decisions.

See, also, notes to 1637, ante, and 1643, post.

Actual time of service.—Service as cadet in Military Academy.—Prior to the enactment of 1640, ante, time spent in the Military Academy by a cadet had to be considered as actual time of service in the Army, in computing his increase of pay. *U. S. v. Morton* (1884), 5 Sup. Ct. 1, 3, 112 *U. S.* 1, 28 L. Ed. 613, affirming 19 Ct. Cl. 200; *U. S. v. Watson* (1889), 9 Sup. Ct. 430, 130 *U. S.* 80, 32 L. Ed. 852; (1889) 19 Op. Atty. Gen. 439; contra, see (1881) 17 Op. Atty. Gen. 93.

Service as civil engineer.—Where an officer served as an assistant civil engineer

in the employ of the War Department on the Florida coast and elsewhere, the actual time of his service in that capacity should not be allowed in computing his longevity pay. (1881) 17 Op. Atty. Gen. 93.

Service as clerk and messenger.—Employment as clerk and messenger in the quartermaster's and subsistence departments is not "service in the army," within the meaning of this section. *Schreiner v. U. S.* (1908), 43 Ct. Cl. 480, distinguishing *U. S. v. Hendee*, 124 *U. S.* 309.

Reopening settlement.—See (1889) 10 Op. Atty. Gen. 439.

1642. Longevity pay based on service outside the Army.—* * * *Provided*, That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be

based on the total of all service in any or all of said services. *Sec. 11, act of May 18, 1920 (41 Stat. 604).*

1643. Service as enlisted man and in volunteer forces to be included in computing longevity.—That on and after the passage of this act, all officers of the Army of the United States who have served as officers in the volunteer forces during the war of the rebellion, or as enlisted men in the armies of the United States, regular or volunteer, shall be, and are hereby, credited with the full time they may have served as such officers and as such enlisted men in computing their service for longevity pay and retirement. * * * *Sec. 7, act of June 18, 1878 (20 Stat. 150).*

Notes of Decisions.

Act is prospective in operation.—(1883) 17 Op. Atty. Gen. 555, 560.

Officers included—Service as enlisted men.—The term "enlisted men," in this section, refers only to certain classes of enlisted men, including Indian scouts and hospital stewards. It refers only to those officers who have risen from the ranks. It does not include cadets at the Military Academy. *Babbitt v. U. S. (1880), 16 Ct. Cl. 202; (1878) 16 Op. Atty. Gen. 611. And see U. S. v. Babbitt (1881), 104 U. S. 767, 768, 26 L. Ed. 921.*

During the war of the rebellion.—The phrase "during the war of the rebellion," in this section, is a limitation upon the provisions thereof only with respect to officers of the Army who have served as officers in the volunteer forces. It does not apply to those officers of the Army who have served as enlisted men in either the volunteer or regular forces. Hence, in computing the service of officers of the latter description for longevity pay and retirement, service performed by them as enlisted men previous to the war of the rebellion must be taken into account. (1878) 16 Op. Atty. Gen. 611.

Retired officers.—This section makes no discrimination against officers on the retired list. *Tyler v. U. S. (1880), 16 Ct. Cl. 223.*

1644. Service in the National Guard, etc., to be included in computing longevity pay.—That officers and enlisted men of the forces of the Army of the United States other than the Regular Army who have had service in the National Guard and Organized Militia of any State, Territory, or District, but who have entered the service in the forces of the Army of the United States, otherwise than through draft under the provisions of section one hundred and eleven of the Act of June third, nineteen hundred and sixteen, known as the national defense Act, shall be upon the same footing as to pay and allowance as the members of said forces who were drafted under the provisions of said section. *Act of July 9, 1918 (40 Stat. 875).*

See notes to 1637, ante.

But see 1694, post.

1645. Longevity pay of retired officers.— * * * *Provided*, That hereafter, except in case of officers retired on account of wounds received in battle, no

Longevity pay.—An officer once in actual service, under color of office, is entitled to have the time credited to him in the computation of longevity pay. *Gould v. U. S., 19 Ct. Cls. 593.*

The time of actual service is to be credited to an officer in the computation of his longevity pay, without regard to a defect in his title to the office. *Palen v. U. S., 19 id. 389.*

Service as chaplain prior to the act of Mar. 2, 1867 (14 Stat. 423), can be reckoned in computing longevity pay, chaplains being in the military service prior to that date. *U. S. v. LaTourette, 151 U. S. 572.*

Service as a contract surgeon can not be reckoned in such computation. *Byrnes v. U. S., 28 Ct. Cls. 302; Hendee v. U. S., 124 U. S., 309.*

Before the passing of the act of July 28, 1866, as well as afterwards, the corps of cadets of the Military Academy was a part of the Army of the United States, and a person serving as a cadet was serving in the Army; and the time during which a person has served as a cadet was, therefore, actual time of service by him in the line of the Army. *Morton v. U. S. 112 U. S., 4, 7.*

officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement. *Act of Mar. 2, 1903 (32 Stat. 932), making appropriations for the support of the Army.*

See notes to 1637, ante.

1646. Longevity pay of retired officers detailed to active duty.—*Provided, further,* That hereafter any retired officer of the Army who has been detailed to active duty, and who has since his retirement, served on active detail shall be entitled to increases of longevity pay to be computed as provided by existing statute for the computation of longevity pay, for the time of his service before retirement and on active detail since his retirement. *Act of May 12, 1917 (40 Stat. 48), making appropriations for the support of the Army.*

1647. Bonus paid to wholly retired officers.—Officers wholly retired from the service shall be entitled to receive, upon their retirement, one year's pay and allowances of the highest rank held by them, whether by staff or regimental commission, at the time of their retirement. *R. S. 1275.*

But see 2406, post.

1648. Rate of pay of retired officers.—Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired. *R. S. 1274.*

* * * *Provided further,* That the increases provided in this Act shall not enter into the computation of the retired pay of officers or enlisted men who may be retired prior to July 1, 1922: * * * *Sec. 13, act of May 18, 1920 (41 Stat. 604).*

See 2406, post.

For status of officers retired before the separation of the Field and Coast Artillery, see 2436, post.

See, also, notes to 1637, ante.

Notes of Decisions.

Nature of pay.—An officer on the retired list owes no service to the Government, and his retired pay is an honorary form of pension. *Geddes v. U. S. (1903), 38 Ct. Cl. 428.*

Pay always follows rank; but rank is not an office. *Cloud v. U. S. (1907), 43 Ct. Cl. 69.*

Amount of pay.—This section intended three-fourths of the full pay the retired officer was entitled to receive when retired, and not three-fourths of allowances which

he was debarred from receiving by 1638, 1639, ante. *Roberts v. U. S. (1874), 10 Ct. Cl. 288. And see Tyler v. U. S. (1880) 16 Ct. Cl. 223; Wood v. U. S. (1883), 2 Sup. Ct. 551, 554, 107 U. S. 414, 27 L. Ed. 542; Marshall v. U. S. (1888), 8 Sup. Ct. 520, 124 U. S. 391, 31 L. Ed. 475; Marshall v. U. S. (1885), 20 Ct. Cl. 370.*

The President can not fix by the order of retirement a rate of pay different from that provided by this section. (1878) 13 Op. Atty. Gen. 442.

1649. Officers over forty-five years of age when originally appointed.—* * * Any person originally appointed under the provisions of this Act at an age greater than forty-five years shall, when retired, receive retired pay at the rate of 4 per centum of active pay for each complete year of commissioned service in the United States Army, the total to be not more than 75 per centum. * * * *Sec. 24, act of June 3, 1916 (39 Stat. 182-183), as amended by sec. 24, act of June 4, 1920 (41 Stat. 771).*

1650. Retired officers of Philippine Scouts.—* * * Those now on the retired list shall hereafter receive the same pay as a retired second lieutenant of

equal service. Officers of the Philippine Scouts shall hereafter be retired under the same conditions, and those hereafter placed on the retired list shall receive the same retired pay, as other officers of like grades and length of service, and shall be equally eligible for advancement on account of active duty performed since retirement. * * * *Sec. 22a, added to the act of June 3, 1916, by sec. 22, act of June 4, 1920 (41 Stat. 770).*

By sec. 26, act of June 3, 1916 (39 Stat. 185), retirement of officers of the Philippine Scouts with the retired pay and allowances of master signal electricians of the Army, was provided for. That section was stricken out by sec. 26, act of June 4, 1920 (41 Stat. 775).

1651. Rate of pay of retired officers while on active duty.— * * * Hereafter retired officers below the grade of brigadier general and retired warrant officers and enlisted men shall, when on active duty, receive full pay and allowances. *Sec. 40b, added to the act of June 3, 1916, by sec. 33, act of June 4, 1920 (41 Stat. 777).*

Sec. 24, act of June 3, 1916 (39 Stat. 183), as amended by sec. 4, act of July 9, 1918 (40 Stat. 890), provided that retired officers on active duty should receive the rank, pay and allowances of the grade, not above colonel, that they would have attained in due course of promotion had they remained on the active list for a period beyond the date of their retirement equal to the total amount of time during which they had been detailed on active duty since their retirement. This provision was stricken out by sec. 24, act of June 4, 1920 (41 Stat. 771). Said sec. 24, as originally enacted, also provided that in time of war retired officers on active duty should receive the full pay and allowances of their grades.

1652. Active duty pay of retired officers above the grade of major.— * * * *Provided*, That retired officers of the Army above the grade of major, heretofore or hereafter assigned to active duty, shall hereafter receive their full retired pay and shall receive no further pay or allowances from the United States: * * * *Act of Mar. 2, 1905 (33 Stat. 831).*

For provision now applicable to all officers below grade of brigadier general, see 1651, ante.

1653. Pay of retired officers detailed to educational institutions.—*Provided*, That the Act approved November third, eighteen hundred and ninety-three, authorizing the detail of officers of the Army and Navy to educational institutions, be amended so as to provide that retired officers, when so detailed, shall receive the full pay and allowances of their rank, except that the limitations on the pay of officers of the Army above the grade of major as provided in the Acts of March second, nineteen hundred and five, and June twelfth, nineteen hundred and six, shall remain in force. *Act of Mar. 3, 1909 (35 Stat. 738), amending act of Nov. 3, 1893 (28 Stat. 7).*

For the provisions of act of Mar. 2, 1905, mentioned as limiting the pay of officers above the grade of major, see 1652, ante. Act of June 12, 1906, also mentioned, was superseded by sec. 24, act of June 3, 1916 (39 Stat. 183), which was amended by sec. 4, act of July 9, 1918 (40 Stat. 890), and stricken out by sec. 24, act of June 4, 1920 (41 Stat. 771). See 1651, ante.

1654. Pay of supernumerary officer when discharged at his own request.— * * * *Provided further*, That any officer who is supernumerary to the permanent organization of the Army as provided by law may, at his own request, be honorably discharged from the Army, and shall thereupon receive one year's pay for each five years of his service, but no officer shall receive more than three years' pay in all: * * * *Act of June 30, 1882 (22 Stat. 118), making appropriations for the support of the Army.*

1655. Pay of officers and enlisted men on duty requiring aerial flights.— * * * Officers and enlisted men of the Army shall receive an increase of 50 per centum of their pay while on duty requiring them to participate regularly and frequently in aerial flights; * * * *Sec. 13a, added to the act of June 3, 1916, by sec. 13, act of June 4, 1920 (41 Stat. 769).*

By sec. 3, act of July 18, 1914 (38 Stat. 515), military aviators had, while so serving, the rank, pay, and allowances of one grade higher than that held by them under their commission, provided said commission was not higher than that of captain, and while on duty requiring regular and frequent flights received an increase of 75 per centum in the pay of their grade and length of service. A similar provision in sec. 13, act of June 3, 1916 (39 Stat. 175), gave the same benefits to junior military aviators not above the grade of captain, except that the amount of the increase was 50 per centum, and made the same provision as the act of July 18, 1914, for military aviators. Sec. 6, act of July 24, 1917 (40 Stat. 245), provided that officers attached to the aviation section of the Signal Corps for duty requiring regular and frequent flights should receive an increase of 25 per centum.

All these provisions are superseded by the above provision, except in the special case of 1658, post.

1656. Additional pay for aviation duty limited.— * * * and hereafter no person shall receive additional pay for aviation duty except as prescribed in this section: * * * *Sec. 13a, added to the act of June 3, 1916, by sec. 13, act of June 4, 1920 (41 Stat. 769).*

1657. Pay of aviation students on flight duty.— * * * Each aviation student authorized by this Act shall, while on duty that requires him to participate regularly and frequently in aerial flights, receive an increase of 25 per centum in the pay of his grade and length of service under his line commission. * * * *Sec. 3, act of July 18, 1914 (38 Stat. 515).*

This section may be held superseded by 1655, 1656, ante, and 1678, post.

1658. Pay of military aviators and junior military aviators.— * * * *Provided*, That in lieu of the 50 per centum increase of pay provided for in this Act any officer or enlisted man upon whom the rating of junior military aviator, or military aviator, has heretofore been conferred for having specially distinguished himself in time of war in active operations against the enemy, shall, while on duty which requires him to participate regularly and frequently in aerial flights, continue to have the rank, pay, and allowances and additional pay now provided by the Act of June 3, 1916, and the Act of July 24, 1917. *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 785).*

Sec. 13, act of June 3, 1916 (39 Stat. 175), provided that while on flying duty the pay of a junior military aviator should be increased 50 per cent, and that of a military aviator 75 per cent, and that each should have rank of one grade higher than that of his commission but not higher than that of captain.

See notes to 1655, ante.

1659. Junior military aeronauts and military aeronauts.— * * * *Provided*, That junior military aeronauts and military aeronauts shall be entitled to the same increase in rank and pay as are now authorized by law for junior military aviators and military aviators, respectively: * * * *Sec. 6, act of July 24, 1917 (40 Stat. 244).*

1660. Pay, allowances, etc., of temporary forces in the Signal Corps and Air Service.—That all officers and enlisted men of the temporary forces of the Signal Corps, including the Aviation Section thereof provided for herein, shall be in all respects on the same footing as to pay, allowances, and pensions as

permanent officers and enlisted men of corresponding grades and length of service in the Regular Army. * * * *Sec. 8, act of July 24, 1917 (40 Stat. 245).*

1661. Pay of officers absent from duty.—Officers when absent on account of sickness or wounds, or lawfully absent from duty and waiting orders, shall receive full pay; when absent with leave, for other causes, full pay during such absence not exceeding in the aggregate thirty days in one year, and half-pay during such absence exceeding thirty days in one year. When absent without leave, they shall forfeit all pay during such absence, unless the absence is excused as unavoidable. *R. S. 1265.*

Notes of Decisions.

Revocation of dismissal or resignation.—The President, having once dismissed a military officer or accepted his resignation and given notice thereof, so that nothing remains to be done to make the severance complete, can not again restore him to office except by a new appointment in pursuance of a nomination to and confirmation by the Senate. *Mimmack v. U. S. (1878), 97 U. S. 426; U. S. v. Corson (1884), 114 U. S. 619, reversing Corson v. U. S. (1881), 17 Ct. Cl. 344, and overruling a contrary doctrine previously prevailing in the Court of Claims.*

Duty status.—The duty status of an officer serving beyond seas remains the same for all purposes until his return home. His detachment from service beyond seas does not take effect until his return; and it continues during delay taken in return, if such delay was allowed as leave of absence and he was entitled to it by law. *Isard v. U. S. (1913), 48 Ct. Cl. 367; distinguishing Roberts v. U. S. (1909), 44 Ct. Cl. 411.*

Absence with leave.—Under this section, an officer coming within its provisions is entitled to half pay while on leave granted by proper authority and can not be deprived of the same by an order of the President. *U. S. v. Andrews (1916), 240 U. S. 90.*

An officer granted and accepting leave without pay is not estopped from demanding the half pay allowed by statute, even though he did not protest at the affixing of such a condition to the order granting

the leave. *Id.; Glavey v. U. S. (1901), 182 U. S. 595.*

An officer held not absent with leave. *U. S. v. Williamson (1874), 23 Wall. 411, 414, 23 L. Ed. 89.*

Awaiting orders.—An officer, ordered home to await orders, can not make his home ambulatory by simply reporting from the places where he may chance to be. *Chilson v. U. S. (1875), 11 Ct. Cl. 691.*

Absence without leave.—The pay of an officer absent without leave is not absolutely forfeited. The absence may be excused as unavoidable. *In re Smith (1888), 23 Ct. Cl. 452.*

The provision that an officer absent without leave shall forfeit all pay unless the absence is excused prevails, whether a court-martial declares a forfeiture or not. *Dodge v. U. S. (1897), 33 Ct. Cl. 28.*

Accepting leave with the condition affixed that it be without pay does not amount to absence without leave for which pay can not be allowed under the statute. *U. S. v. Andrews (1916), 240 U. S. 90.*

Suspension from duty.—An officer of the Army, while suspended from duty, is not entitled to emoluments or allowances. *Swaim v. U. S. (1897), 17 Sup. Ct. 448, 453, 165 U. S. 553, 41 L. Ed. 823.*

Recovery of payments made.—Where payments have erroneously been made to an officer for a period during which he was absent without leave it may be recovered back. *Crowell v. U. S. (1887), 22 Ct. Cl. 69.*

1662. Full pay of officers absent with leave.—That an act approved May eighth, eighteen hundred and seventy-four, in regard to leave of absence of Army officers, be, and the same is hereby, so amended that all officers on duty shall be allowed, in the discretion of the Secretary of War, sixty days' leave of absence without deduction of pay or allowances: *Provided*, That the same be taken once in two years: *And provided further*, That the leave of absence may be extended to three months, if taken once only in three years, or four months if taken once only in four years. * * * *Act of July 29, 1876 (19 Stat. 102), amending act of May 8, 1874 (18 Stat. 43).*

Notes of Decisions.

See, also, notes to 1861, ante.

Commutation of quarters.—An officer in the enjoyment of quarters in kind at the commencement of leave (cumulative) does not become entitled to commutation upon the commencement of the leave, nor does he become entitled to commutation if, during such leave, he voluntarily abandons the use of the quarters in kind; nor if he vacates them at the command of his superior; nor if there are unoccupied quarters that might properly have been assigned to him had not leave been granted. (1881) 17 Op. Atty. Gen. 41.

Sec. 31 of the act of Mar. 3, 1863 (12 Stat. 736), does not apply to an officer ordered to proceed to his home and there await orders, though the order was issued at his own request. An officer "absent with leave" is at liberty to go where he will; an officer ordered to a particular

place, there to await orders, must remain in that place and continue as much under orders as though assigned to any ordinary military duty. *Williamson v. U. S.*, 10 Ct. Cls. 50, and 23 Wall., 411; *Phisterer v. U. S.*, 11 Ct. Cls. 98, and 94 U. S. 219.

An officer ordered home to await orders may change his place of residence, reporting the fact to the War Department. *Phisterer v. U. S.*, 12 Ct. Cls. 98.

An officer ordered home to await orders can not make his home ambulatory by simply reporting from the places where he may chance to be. *Chilson v. U. S.*, 11 Ct. Cls. 601.

Pay while under charges.—The fact that an officer or soldier is under charges does not by military law deprive him of his pay, although under the application of military rules exceptions may arise to this rule. *Dodge v. U. S.*, 33 Ct. Cls. 28.

1663. Volunteer service included in computing accrued leave of officers.—

* * * *Provided*, That officers appointed to the Regular Army from the volunteer service, whose service has been continuous, shall, in the computation of leaves of absence after their appointment in the Regular Army, be entitled to the leave credits which accrued to them as volunteer officers where such leave credits were not availed of during their volunteer service. *Act of June 30, 1902* (32 Stat. 508), *making appropriations for the support of the Army*.

1664. Leaves of absence of instructors at service schools.— * * * *Provided*, That the provisions of section thirteen hundred and thirty, Revised Statutes, authorizing leaves of absence to certain officers of the Military Academy, during the period of the suspension of the ordinary academic studies, without deduction from pay and allowances, be, and are hereby, extended to include officers on duty exclusively as instructors at the service schools on approval of the officer in charge of said schools. *Act of Mar. 23, 1910* (36 Stat. 244), *making appropriations for the support of the Army*.

R. S. 1330, the provisions of which are extended by this act, is set forth, 2854, post.

1665. Period of leave of absence of officers detailed to Alaska or on foreign service.— * * * *Provided*, That leaves of absence which may be granted officers of the Regular or Volunteer Army serving in the Territory of Alaska or without the limits of the United States, for the purpose of returning thereto, or which may have been granted such officers for such purpose since the thirteenth day of October, eighteen hundred and ninety-eight, shall be regarded as taking effect on the dates such officers reached or may have reached the United States, respectively, and as terminating, or as having terminated, on the respective dates of their departure from the United States in returning to their commands, as authorized by an order of the Secretary of War, dated October thirteenth, eighteen hundred and ninety-eight: * * * *Act of Mar. 2, 1901* (31 Stat. 902), *making appropriations for the support of the Army*.

1666. Period of leave of absence of officers from the Philippines.— * * * *Provided further*, That leaves to be absent from the Philippine Islands, other than to return to the United States, which may be granted officers of the Army serving in said islands and sailing from Manila, shall be regarded as taking ef-

fect on the dates such officers reach Manila, and as terminating on the dates of their departure from Manila, in returning to their stations. *Act of Mar. 2, 1907 (34 Stat. 1171), making appropriations for the support of the Army.*

1667. Pay of officers forfeited during absence without leave.—Every officer who is dropped by the President from the rolls of the Army, for absence from duty three months without leave, shall forfeit all pay due or to become due. *R. S. 1266.*

1668. Pay forfeited during disease due to misconduct.— * * * *Provided,* That hereafter no officer or enlisted man in active service who shall be absent from duty on account of disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of War: * * * *Act of Apr. 27, 1914 (38 Stat. 353), making appropriations for the support of the Army.*

A soldier absent for more than one day due to any of the above reasons must also make good the time lost, by A. W. 107, chap. 52, post.

1669. Warrant officers.— * * * Warrant officers other than those of the Army Mine Planter Service, shall receive base pay of \$1,320 a year and the allowances of a second lieutenant, shall be entitled to longevity pay and to retirement under the same conditions as commissioned officers; * * * *Sec. 4a, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920 (41 Stat. 761).*

That, commencing January 1, 1920, warrant officers, Army Mine Planter Service, shall be paid, in addition to all pay and allowances now authorized by law, an increase at the rate of \$240 per annum: *Provided,* That this increase shall remain effective until the close of the fiscal year ending June 30, 1922, unless sooner amended or repealed. *Act of June 5, 1920 (41 Stat. 956-957), making appropriations for the support of the Army.*

Warrant officers were created for the mine planter service, by the act of July 9, 1918, post 2138. This act first established that grade in the Army.

For additional pay for foreign service, see 1691, post.

1670. No bounty for enlisting.—No bounty shall be paid to induce any person to enlist in the military service of the United States; * * * *Sec. 3, act of May 18, 1917 (40 Stat. 78).*

The above is taken from the selective service act, providing for raising forces for the World War. It is superseded, so far as three-year enlistments are concerned, by the provisions of 1693, post.

R. S. 1120 (based on Joint Res. No. 37, June 21, 1862, 12 Stat. 620, and repealed by act of May 12, 1917, 40 Stat. 53), provided for "a premium of two dollars," to be paid to any citizen or enlisted man for each accepted recruit he brought to a recruiting rendezvous. Although incorporated in the Revised Statutes, the provision was regarded as practically obsolete from the close of the Civil War. By sec. 27, national defense act of June 3, 1916 (39 Stat. 186), the President was authorized to utilize the services of postmasters of the second, third, and fourth classes in procuring recruits for the Army, and for each accepted recruit the postmaster was to receive five dollars; that provision was repealed by sec. 11, act of July 2, 1918 (40 Stat. 754).

1671. Pay of enlisted men.—On and after July 1, 1920, the grades of enlisted men shall be such as the President may from time to time direct, with monthly base pay at the rate of \$74 for the first grade, \$53 for the second grade, \$45 for the third grade, \$45 for the fourth grade, \$37 for the fifth grade, \$35 for the sixth grade, and \$30 for the seventh grade. Of the total authorized number of enlisted men, those in the first grade shall not exceed 0.6 per centum, those

in the second grade 1.8 per centum, those in the third grade 2 per centum, those in the fourth grade 2.5 per centum, those in the fifth grade 3.5 per centum, those in the sixth grade 5 per centum. * * * *Provided*, That nothing in this section shall operate to reduce the pay which any enlisted man is now receiving, during his current enlistment and while he holds his present grade, nor to change the present rate of pay of any enlisted men now on the retired list. *Sec. 4b, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920 (41 Stat. 762).*

That hereafter the monthly pay of enlisted men of the Army during their first enlistment shall be as follows, namely: Master electricians, master signal electricians, seventy-five dollars; engineers, sixty-five dollars; sergeants first class Hospital Corps, fifty dollars; regimental sergeants-major, regimental quartermaster-sergeants, regimental commissary-sergeants, sergeants-major senior grade coast artillery, battalion sergeants-major of engineers, post quartermaster-sergeants, post commissary-sergeants, post ordnance-sergeants, battalion quartermaster-sergeants of engineers, electrician-sergeants first class, sergeants first class Signal Corps, and first sergeants, forty-five dollars; battalion sergeants-major of infantry and field artillery, squadron sergeants-major, sergeants-major junior grade coast artillery, battalion quartermaster-sergeants, field artillery, and master gunners, forty dollars; electrician-sergeants second class, sergeants of engineers, ordnance, and Signal Corps, quartermaster-sergeants of engineers, and color-sergeants, thirty-six dollars; sergeants and quartermaster-sergeants of cavalry, artillery, and infantry, stable-sergeants, sergeants, and acting cooks of the Hospital Corps, firemen, and cooks, thirty dollars; * * * privates first class of engineers, ordnance, Signal Corps, and Hospital Corps, eighteen dollars; privates, Hospital Corps, sixteen dollars; trumpeters, musicians of infantry, artillery, and engineers, privates of cavalry, artillery, infantry, Signal Corps, and private second class, engineers and ordnance, fifteen dollars. *Act of May 11, 1908 (35 Stat. 109), making appropriations for the support of the Army.*

Hereafter the monthly pay of enlisted men of certain grades of the Army created in this Act shall be as follows, namely: Quartermaster sergeant, senior grade, Quartermaster Corps; master hospital sergeant, Medical Department; master engineer, senior grade, Corps of Engineers; and band leader, Infantry, Cavalry, Artillery, and Corps of Engineers, \$75; hospital sergeant, Medical Department; and master engineer, junior grade, Corps of Engineers, \$65; sergeant, first class, Medical Department, \$50; sergeant, first class, Corps of Engineers; regimental supply sergeant, Infantry, Cavalry, Field Artillery, and Corps of Engineers; battalion supply sergeant, Corps of Engineers; and assistant engineer, Coast Artillery Corps, \$45; assistant band leader, Infantry, Cavalry, Artillery, and Corps of Engineers; and sergeant bugler, Infantry, Cavalry, Artillery, and Corps of Engineers, \$40; musician, first class, Infantry, Cavalry, Artillery, and Corps of Engineers; supply sergeant, mess sergeant, and stable sergeant, Corps of Engineers; sergeant, Medical Department, \$36; supply sergeant, Infantry, Cavalry, and Artillery; mess sergeant, Infantry, Cavalry, and Artillery; cook, Medical Department; horseshoer, Infantry, Cavalry, Artillery, Corps of Engineers, Signal Corps, and Medical Department; stable sergeant, Infantry and Cavalry; radio sergeant, Coast Artillery Corps; and musicians, second class, Infantry, Cavalry, Artillery, and Corps of Engineers, \$30; musician, third class, Infantry, Cavalry, Artillery and Corps of Engineers; corporal, Medical Department, \$24; saddler, Infantry, Cavalry, Field Artillery, Corps of Engineers, and Medical Department; mechanic, Infantry, Cavalry,

and Field Artillery, and Medical Department; farrier, Medical Department; and wagoner, Infantry, Field Artillery, and Corps of Engineers, \$21; private, first class, Infantry, Cavalry, Artillery, and Medical Department, \$18; private, Medical Department, and bugler, \$15. Nothing herein contained shall operate to reduce the pay or allowances now authorized by law for any grade of enlisted men of the Army. *Sec. 28, Act of June 3, 1916 (39 Stat. 186).*

The rates of pay of enlisted men were prescribed by R. S. 1280-1284, which sections, as well as numerous intermediate acts relating to particular grades of enlisted men, were either expressly repealed or superseded by the act of May 11, 1908 (35 Stat. 109), above cited, and the act of May 28, 1908 (35 Stat. 431), the latter act relating only to enlisted bandmen and field musicians on duty at the Military Academy. Sec. 28 of the national defense act of June 3, 1916 (39 Stat. 186), above cited, prescribed the rate of pay for a large number of grades specifically mentioned therein, but this section was repealed by sec. 28, act of June 4, 1920 (41 Stat. 775), except as to a later added proviso relating to the pay of military telegraphers, post, 1685.

The principal acts relating to increased pay during the World War are sec. 10, act of May 18, 1917, post 1692, act of July 9, 1918 (40 Stat. 851), and act of July 11, 1919, post 1692.

The grades and specialist ratings of enlisted men, under the above act, were prescribed by G. O. 36, W. D. 1920, June 19, 1920. See also 1682, post.

Notes of Decisions.

Right to pay in general.—A soldier who denies the validity of his enlistment, seeks to vacate it by means of *habeas corpus*, renders no service, and ultimately accepts a discharge, granted on condition "that he make good all indebtedness by him to the United States," can not maintain an action for his pay. *Grimley v. U. S.*

(1897), 32 Ct. Cl. 285.

Excess payments.—A soldier should not be held accountable for money paid him in excess of the amount to which he was entitled, where such payment was made through a mistake of law on the part of the executive officers of the Government. (1896) 21 Op. Atty. Gen. 323.

1672. Increase in pay of enlisted men and Army Nurse Corps.—That, commencing January 1, 1920, the pay of all enlisted men of the Army and Marine Corps and of members of the female Nurse Corps of the Army and Navy is hereby increased 20 per centum: *Provided*, That such increase shall not apply to enlisted men whose initial pay, if it has already been permanently increased since April 6, 1917, is now less than \$33 per month. *Sec. 4, act of May 18, 1920 (41 Stat. 602).*

That the provisions of sections * * * 4, * * * of this Act shall remain effective until the close of the fiscal year ending June 30, 1922, unless sooner amended or repealed: *Provided*, That the rates of pay prescribed in sections 4 * * * hereof shall be the rates of pay during the current enlistment of all men in active service on the date of the approval of this Act, and for those who enlist, reenlist, or extend their enlistment prior to July 1, 1922, for the term of such enlistment, reenlistment, or extended enlistment: * * * *Sec. 13, act of May 18, 1920 (41 Stat. 604).*

* * * The temporary increase of pay for enlisted men of the Army authorized by section 4 of the Act of Congress approved May 18, 1920, shall be computed upon the base pay provided for in this section, and shall apply only to enlisted men of the first five grades. * * * *Sec. 4b, added to the act of June 3, 1916, by sec. 4 act of June 4, 1920 (41 Stat. 761).*

1673. Pay and allowances of flying cadets.—* * * The base pay of a flying cadet shall be \$75 per month, including extra pay for flying risk as provided by law. The ration allowance of a flying cadet shall not exceed \$1 per day, and his other allowances shall be those of a private, first class, Air Service.

* * * *Act of July 11, 1919 (41 Stat. 109), making appropriations for the support of the Army: Air Service.*

See 673, ante.

1674. Pay of warrant officers and enlisted men, Army Mine Planter Service.—

* * * : *And provided further*, That the annual pay of the warrant officers and enlisted men in the various grades established by this chapter shall be as follows: Masters, \$1,800; first mates, \$1,320; second mates, \$972; chief engineers, \$1,700; assistant engineers, \$1,200; oilers, \$432; firemen, \$396; deck hands, \$216; cooks, \$360; steward, \$540; assistant stewards, \$288: *And provided further*, That warrant officers shall have such allowances as the Secretary of War may prescribe, and shall be retired, and shall receive longevity pay, as now provided by law for officers of the Army, and that the enlisted force herein provided for shall receive the allowances and continuous-service pay now provided by law for enlisted men of the Army: *And provided further*, That in computing length of service for retirement, and in computing longevity pay for warrant officers and continuous-service pay for the enlisted men authorized by this chapter, service on boats in the service of the Quartermaster Department of the Quartermaster Corps prior to the passage of this Act shall be counted: *And provided further*, That during the continuation of the present emergency all enlisted men of the Mine Planter Service of the Army of the United States in active service whose base pay does not exceed \$21 per month shall receive an increase of \$15 per month; those whose base pay is \$24, an increase of \$12 per month; those whose base pay is \$30, \$33, \$36, or \$40, an increase of \$8 per month; and those whose base pay is \$45 or more, an increase of \$6 per month: *And provided further*, That the increases of pay herein authorized shall not enter into the computation of continuous-service pay. *Chap IX, act of July 9, 1918 (40 Stat. 882).*

But see 1694, post.

Warrant officers of the Army mine planter service are additional to, and do not receive the same pay, as the warrant officers created by sec. 4a act of June 4, 1920, ante, 1069.

For additional pay for foreign service, see 1691, post.

1675. Pay of Indian scouts.—Indians, enlisted or employed by order of the President as scouts, shall receive the pay and allowances of cavalry soldiers. *R. S. 1276.*

* * * And the scouts, when they furnish their own horses and horse equipments, shall be entitled to receive forty cents per day for their use and risk so long as thus employed. *Act of Aug. 12, 1876 (19 Stat. 131).*

1676. Pay and allowances of Philippine Scouts.—* * * The pay, rations, and clothing allowances to be authorized for the enlisted men shall be fixed by the Secretary of War, and shall not exceed those authorized for the Regular Army. * * * *Sec. 36, act of Feb. 2, 1901 (31 Stat. 757).*

Nothing in the act of June 4, 1920 (41 Stat. 759), is to be construed to alter the status of enlisted men of the Philippine Scouts, post, 2151.

1677. Pay and allowances of chauffeurs, Signal Corps.—* * * The pay and allowances of a chauffeur, first class, shall be the same as a sergeant, first class, in the Signal Corps. Pay and allowances of a chauffeur shall be the same as a sergeant in the Signal Corps. * * * *Sec. 3, act of July 24, 1917 (40 Stat. 244).*

But see 1671, ante.

1678. Pay and allowances of cooks.—The cooks authorized by this Act shall have the pay and allowances of sergeants of infantry. *Sec. 9, act of March 2, 1899 (30 Stat. 979).*

But see 1671, ante.

The first provision made for regularly enlisted cooks was by act of July 7, 1898 (30 Stat. 721), which provides for the pay of a corporal of his arm. post, 2185.

1679. Extra duty pay.— * * * All laws and parts of laws providing for extra duty pay for enlisted men are repealed, to take effect July 1, 1920: * * * *Sec. 4b, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920 (41 Stat. 761).*

The Army appropriation act of Aug. 29, 1916 (39 Stat. 632), providing for extra-duty pay to the United States disciplinary barracks guard, was superseded by act of May 12, 1917 (40 Stat. 52). Extra-duty pay was provided for mess stewards, cooks, and instructor cooks, certain office work and switchboard operators, and for work on the Washington-Alaska cable and telegraph system, and signal service men by act of July 11, 1919 (41 Stat. 112, 115), also by June 20, 1878 (20 Stat. 219).

For current appropriation for such extra-duty pay see act of June 5, 1920 (41 Stat. 959), making appropriations for the support of the Army.

1680. Extra-duty pay not allowed in addition to increased pay for foreign service.— * * * *Provided further,* That enlisted men receiving or entitled to the twenty per centum increased pay herein authorized shall not be entitled to or receive any additional increased compensation for what is known as extra or special duty. *Act of Mar. 2, 1901 (31 Stat. 903), making appropriations for the support of the Army.*

The provisions for increase of pay for foreign service made in this act was superseded by permanent legislation. See post, 1688. See also 1679, ante.

1681. Additional pay to mess sergeants, mechanics, etc.— * * * *Provided,* That mess sergeants shall receive six dollars per month in addition to their pay; corporals of engineers, ordnance, Signal Corps, and Hospital Corps, chief mechanics, and mechanics, coast artillery, twenty-four dollars; corporals of cavalry, artillery, and infantry, mechanics of field artillery, blacksmiths and farriers, saddlers, wagoners, and artificers, twenty-one dollars: * * * *Act of May 11, 1908 (35 Stat. 109), making appropriations for the support of the Army.*

But see 1671, ante, and 1682, post.

1682. Additional pay of specialists.— * * * Under such regulations as the Secretary of War may prescribe, enlisted men of the sixth and seventh grades may be rated as specialists, and receive extra pay therefor per month, as follows: First class, \$25; second class, \$20; third class, \$15; fourth class, \$12; fifth class, \$8; sixth class, \$3. Of the total authorized number of enlisted men in the sixth and seventh grades, those rated as specialists of the first class shall not exceed 0.7 per centum; of the second class, 1.4 per centum; of the third class, 1.9 per centum; of the fourth class, 4.7 per centum; of the fifth class, 5 per centum; of the sixth class, 15.2 per centum. * * * *Sec. 4b, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920 (41 Stat. 761).*

The grades and specialist ratings of enlisted men, under the above act, were prescribed by G. O. 36, W. D. 1920, June 19, 1920.

1683. Additional pay for aviation mechanicians and for flight duty.— * * * Each aviation enlisted man, while on duty that requires him to participate regularly and frequently in aerial flights, or while holding the rating of aviation mechanic, shall receive an increase of fifty per centum in his pay. * * * *Sec. 3, act of July 18, 1914 (38 Stat. 516).*

But see 1655 and 1656, ante.

1684. Additional pay for balloon mechanics.— * * * *Provided*, That balloon mechanics shall receive the same increase of pay as now prescribed by law for aviation mechanics. *Sec. 7, act of July 24, 1917 (40 Stat. 245).*

But see 1655 and 1656, ante.

1685. Additional pay for military telegraphers, etc.—That section twenty-eight of said Act be, and is hereby, amended by striking out the period at the end thereof, substituting therefor a colon, and adding the following:

“Provided, That enlisted men who are now qualified, or who may hereafter qualify, as expert military telegraphers, shall receive \$5 a month; as first-class military telegraphers, \$3 a month; as military telegraphers, \$2 a month; all in addition to their pay, under such regulations as the Secretary of War may prescribe, but no enlisted man shall receive at the same time additional pay for more than one of the classifications named.” *Sec. 5, Chap. XVII, act of July 9, 1918 (40 Stat. 890), amending sec. 28, act of June 3, 1916 (39 Stat. 187).*

That said Act be, and the same is hereby, amended by striking out section 28, with the exception of the proviso added thereto by Chapter XVII, section 5 of an Act of Congress approved July 9, 1918, providing pay for qualification as telegraphers. *Sec. 28, act of June 4, 1920 (41 Stat. 775), amending sec. 28, act of June 3, 1916 (39 Stat. 186-187).*

1686. Additional pay of marksmen, etc.—That hereafter enlisted men now qualified or hereafter qualifying as marksmen shall receive \$2 per month; as sharpshooters, \$3 per month; as expert riflemen, \$5 per month; as second-class gunners, \$2 per month; as first-class gunners, \$3 per month; as expert first-class gunners, Field Artillery, \$5 per month; as gun pointers, gun commanders, observers second-class, chief planters, and chief loaders, \$7 per month; as plotters, observers first-class, casemate electricians, and coxswains, \$9 per month, all in addition to their pay, under such regulations as the Secretary of War may prescribe, but no man shall receive at the same time additional pay for more than one of the classifications named in this section. *Act of May 11, 1908 (35 Stat. 110), as amended by act of May 12, 1917 (40 Stat. 45).*

Previous provisions for additions to pay of first-class gunners and second-class gunners, made by sec. 7, act of Feb. 2, 1901 (31 Stat. 749), and act of Apr. 23, 1904 (33 Stat. 260), and to pay of men qualifying as marksmen, sharpshooters, or expert riflemen, made by act of Mar. 2, 1903 (32 Stat. 929), and June 12, 1906 (34 Stat. 241), were superseded by act of May 11, 1908 (35 Stat. 110), which was superseded by the provisions of this act.

1687. Vacant.

1688. Additional pay for foreign service.— * * * *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto. *Act of June 30, 1902 (32 Stat. 512), making appropriations for the support of the Army.*

That increase of pay for service beyond the limits of the States comprising the Union, and the territories of the United States contiguous thereto, shall be as now provided by law. *Act of May 11, 1908 (35 Stat. 110), making appropriations for the support of the Army.*

For additional 10 per centum increase of pay of officers on foreign service, \$291,797.

For additional 20 per cent increase of pay of enlisted men on foreign service, \$1,497,548. *Act of June 5, 1920 (41 Stat. 956), making appropriations for the support of the Army; Pay of the Army and miscellaneous.*

Similar provisions appear in previous appropriation acts.

Notes of Decisions.

See notes to 1637, ante.

Construction.—The provision in the appropriation acts of 1906 and 1907, excepting Hawaii and Porto Rico from the operation of the provision for additional pay, is not to be construed as prevailing over the explicit provision of the act of June 30, 1902, and the salary provided by law for officers in foreign service referred to in the act of May 11, 1908, is that fixed by the act of June 30, 1902. *U. S. v. Vulte (1914), 233 U. S. 509.* But see 1690, post, making a permanent exception of the islands named from the benefits of the laws allowing increase of pay for foreign service.

Construction of section in general.—The right of officers to increased pay while serving beyond the limits of the United States proper is made clear by this section, and there is no language in subsequent acts which repeals it. *Vulte v. U. S. (1912), 47 Ct. Cl. 324.*

This section can not be extended to an officer whose necessary expenses are by the terms of the employment paid by the Government. *Carden v. U. S. (1910), 45 Ct. Cl. 171.*

Pay proper.—"Pay proper" means the fixed amount given by law to officers, as distinguished from pay and emoluments or pay and allowances. The increase of an officer's pay is to be computed on his longevity pay, if any. *Irwin v. U. S. (1903), 38 Ct. Cl. 87.*

The "pay proper" on which the percentage of increased pay to an Army officer serving in the Philippine Islands is to be computed, under this section, includes the longevity pay to which he is entitled, under section 1637, ante, as well as the minimum pay prescribed by 1627, ante. *U. S. v. Mills (1905), 25 Sup. Ct. 434, 436, 197 U. S. 223, 49 L. Ed. 732; Irwin v. U. S. (1903), 38 Ct. Cl. 87.*

Actually stationed.—The intent of this section is that only such commissioned officers and enlisted men are to receive the extra pay as are actually stationed either in some foreign country or in some of our outlying possessions. *Lafitte v. U. S. (1908), 43 Ct. Cl. 166.*

Service included.—This section extends only to officers rendering military service, and does not extend to an officer detailed

for duty in connection with an exposition. *Carden v. U. S. (1907), 42 Ct. Cl. 185.*

The ocean is the highway of nations, and can not be denominated a foreign place. Hence a quartermaster in the Army, assigned to duty on transports plying between San Francisco and Manila, the most of whose time was spent in the high seas, was not entitled to the increase provided by this section. *Lafitte v. U. S. (1908), 43 Ct. Cl. 166.*

The service of an officer assigned to duty which requires him to travel in Europe from place to place, his traveling expenses being paid by the Government, is not service "at foreign stations," within this section. *Carden v. U. S. (1910), 45 Ct. Cl. 171.*

Place of service.—This section indicates no intention to discriminate between those serving in Porto Rico and Hawaii and those serving in other insular possessions. *Vulte v. U. S. (1912), 47 Ct. Cl. 324.* (See 1690, post).

Time of continuance.—The duty status of an officer serving beyond seas remains the same for all purposes until his return home. His detachment from service beyond seas does not take effect until his return; and it continues during delay taken in return, if such delay was allowed as leave of absence and he was entitled to it by law. *Izard v. U. S. (1913), 48 Ct. Cl. 367, distinguishing Roberts v. U. S. (1909), 44 Ct. Cl. 411.*

Increase of pay.—The words "shall be as now provided by law," in provision of act of May 11, 1908, to increase the pay for Army service beyond the States comprising the Union and the territories contiguous, refer to the proviso in act of June 30, 1902, that the pay proper of all commissioned officers and enlisted men serving shall be increased 10 per cent and 20 per cent, respectively, and a commissioned officer serving in Porto Rico from June, 1908, until November, 1909, is entitled to such 10 per cent increase, notwithstanding the specific exception of Porto Rico and Hawaii in acts of June 12, 1906, and act of Mar. 2, 1907, making appropriations for such increase. *U. S. v. Vulte (1914), 34 S. Ct. 664, 233 U. S. 509, 58 L. Ed. 1071, affirming judgment Vulte v. U. S. (1912), 47 Ct. Cl. 324.*

1689. Foreign service pay for service on Army transports.— * * * *Provided*, That officers and enlisted men who have served on army transports in the Philippine Archipelago at any time since May twenty-sixth, nineteen hundred, under the control and orders of the commanding general, Philippines Division, or who may hereafter so serve, shall be entitled to receive the same rate of pay as is provided by law for officers and enlisted men serving at shore stations beyond the limits of the United States. *Act of May 11, 1908 (35 Stat. 114)*, making appropriations for the support of the Army.

1690. Limitations on foreign service pay.— * * * *Provided*, That hereafter the laws allowing increase of pay to officers and enlisted men for foreign service shall not apply to service in the Canal Zone, Panama, or Hawaii or Porto Rico. *Act of Aug. 24, 1912 (37 Stat. 576)*, making appropriations for the support of the Army.

See notes to 1688, ante.

1691. Additional pay of warrant officers on foreign service.— * * * *Provided*, That hereafter warrant officers shall receive the same increase of pay for service beyond the continental limits of the United States as is allowed to commissioned officers of the Army. *Act of July 11, 1919 (41 Stat. 112)*, making appropriations for the support of the Army.

1692. Increased pay of enlisted men during the war with Germany.— * * * and commencing June one, nineteen hundred and seventeen, and continuing until the termination of the emergency, all enlisted men of the Army of the United States in active service whose base pay does not exceed \$21 per month shall receive an increase of \$15 per month; those whose base pay is \$24, an increase of \$12 per month; those whose base pay is \$30, \$36, or \$40, an increase of \$8 per month; and those whose base pay is \$45 or more, an increase of \$6 per month: * * * *Sec. 10, act of May 18, 1917 (40 Stat. 82)*.

* * * *Provided*, That the provisions of section 10 of an Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May 18, 1917, in so far as it increases the pay of the enlisted men of the Army, be, and the same hereby are, continued in force and effect from and after the date and approval of this Act. *Act of July 11, 1919 (41 Stat. 110)*, making appropriations for the support of the Army.

But see 1671 and 1682, ante; see also 1672, ante.

1693. Enlistment or reenlistment bonus.— * * * Existing laws providing for the payment of three months' pay to certain soldiers upon reenlistment are hereby repealed, and hereafter an enlistment allowance equal to three times the monthly pay of a soldier of the seventh grade shall be paid to every soldier who enlists or reenlists for a period of three years, payment of the enlistment allowance for original enlistment to be deferred until honorable discharge. *Sec. 27, act of June 4, 1920 (41 Stat. 775)*, amending *sec. 27, act of June 3, 1916 (39 Stat. 185)*.

By a provision of the act of May 11, 1908 (35 Stat. 110), a soldier honorably discharged at the termination of his first enlistment period who reenlisted within three months of the date of such discharge received an amount equal to three months' pay at the rate he was receiving at the time of his discharge.

1694. Continuous service pay.— * * * Existing laws providing for continuous service pay are repealed to take effect July 1, 1920, and thereafter enlisted men shall receive an increase of 10 per centum of their base pay for each five years of service in the Army, or service which by existing law is

held to be the equivalent of Army service, such increase not to exceed 40 per centum. * * * *Sec. 4b, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920 (41 Stat. 761).*

Before the act of May 11, 1908, pay on reenlistment and continuous-service pay were provided for by R. S. 1282-1284, and subsequent acts, especially sec. 3, act of Aug. 1, 1894 (28 Stat. 216). All such provisions previous to said act of May 11, 1908, were superseded by its provisions, and R. S. 1284 was repealed by a further provision thereof (35 Stat. 110).

This section repealed the act of May 11, 1908 (35 Stat. 109), providing for continuous-service pay and provisions of said act, post 2171, and of sec. 27, act of June 3, 1916 (39 Stat. 186), prescribing, among other things, that three years should be counted as an enlistment period in computing continuous-service pay.

Service in the National Guard or Organized Militia, see ante, 1637, 1644, and notes thereto.

1695. Continuous-service pay independent of foreign-service pay.— * * *

Provided, That the increases of pay herein authorized shall not enter into the computation of the continuous-service pay. *Sec. 10, act of May 18, 1917 (40 Stat. 82).*

1696. Former commissioned service of enlisted men to be counted toward continuous-service pay.— * * * *Provided*, That all enlisted men of the Regular Army who served as commissioned officers of United States Volunteers organized in eighteen hundred and ninety-eight and eighteen hundred and ninety-nine, or who have served or may be now serving as such in the Porto Rico Provisional Regiment or in the Philippine Scouts, who, upon their muster out, have returned or may return to the ranks of the Regular Army, shall have such period of service counted as if it had been rendered as enlisted men, and that they be entitled to all continuous-service pay and to count, in computing the time necessary to enable them to retire, as enlisted men. *Act of Mar. 2, 1903 (32 Stat. 934), making appropriations for the support of the Army.*

* * * *Provided*, That all enlisted men of the Regular Army who have been appointed commissioned officers of Philippine Scouts subsequent to March second, nineteen hundred and three, or who may hereafter be so appointed, and who, upon their muster out, have returned or may return to the ranks of the Regular Army, shall have such period of service counted as if it had been rendered as enlisted men, and that they be entitled to all continuous service pay and to count, in computing the time necessary to enable them to retire, as enlisted men. *Act of June 12, 1906 (34 Stat. 248), making appropriations for the support of the Army.*

1697. Active service of National Guard and reserve officers counted in computing continuous-service pay.— * * * and that in computing service for retirement and continuous service pay, service as an officer in the National Guard, or in any volunteer force that may be authorized in the future, while in the service of the United States, be counted.

Provided further, That hereafter any enlisted man of the Army who shall be discharged to enable him to accept a commission in the Officers' Reserve Corps, or in any National Guard or militia organization, or in any volunteer force that may be authorized in the future, and who shall enlist in the Army within three months after the termination of his connection as an officer with that corps, or with any organization of the National Guard or militia, or a volunteer force, or during the continuation of his connection therewith, as an officer, shall, in computing continuous service pay now authorized by law, be entitled to credit for the period of time actually served by him prior to said discharge, and in computing service for retirement and continuous service pay, service as an

officer of the National Guard, while in the service of the United States, service in any volunteer force, and service in the Officers' Reserve Corps in active service shall be counted. *Act of May 12, 1917 (40 Stat. 74), making appropriations for the support of the Army.*

1698. Bonus on discharge of an enlisted man.—That all persons serving in the military or naval forces of the United States during the present war who have, since April 6, 1917, resigned or been discharged under honorable conditions (or, in the case of reservists, been placed on inactive duty), or who at any time hereafter (but not later than the termination of the current enlistment or term of service) in the case of the enlisted personnel and female nurses, or within one year after the termination of the present war in the case of officers, may resign or be discharged under honorable conditions (or, in the case of reservists, be placed on inactive duty), shall be paid, in addition to all other amounts due them in pursuance of law, \$60 each.

This amount shall not be paid (1) to any person who though appointed or inducted into the military or naval forces on or prior to November 11, 1918, had not reported for duty at his station on or prior to such date; or (2) to any person who has already received one month's pay under the provisions of section 9 of the Act entitled "An Act to authorize the President to increase temporarily the military establishment of the United States," approved May 18, 1917; or (3) to any person who is entitled to retired pay; or (4) to the heirs or legal representatives of any person entitled to any payment under this section who has died or may die before receiving such payment. In the case of any person who subsequent to separation from the service as above specified has been appoluted or inducted into the military or naval forces of the United States and has been or is again separated from the service as above specified, only one payment of \$60 shall be made.

The above amount, in the case of separation from the service on or prior to the passage of this Act, shall be paid as soon as practicable after the passage of this Act, and in the case of separation from the service after the passage of this Act shall be paid at the time of such separation.

The amounts herein provided for shall be paid out of the appropriations for "pay of the Army," and "pay of the Navy," respectively, by such disbursing officers as may be designated by the Secretary of War and the Secretary of the Navy.

The Secretary of War and the Secretary of the Navy respectively shall make all regulations necessary for the enforcement of the provisions of this section. *Sec. 1406, act of Feb. 24, 1919 (40 Stat. 1151).*

* * * *Provided*, That in case any enlisted man has been or hereafter shall be discharged for the purpose of reenlisting in the Regular Army, he shall be entitled to the payment of \$60 as provided in section 1406 of the Act entitled "An Act to provide revenue, and for other purposes," approved February 24, 1919. *Joint Res. 14, Sept. 29, 1919 (41 Stat. 291).*

1699. Bonus on muster out of volunteer organizations.—That in lieu of granting leaves of absence and furloughs to officers and enlisted men belonging to companies and regiments of United States Volunteers prior to muster out of the service, all officers and enlisted men belonging to volunteer organizations hereafter mustered out of the service who have served honestly and faithfully beyond the limits of the United States shall be paid two months' extra pay on muster out and discharge from the service, and all officers and enlisted men belonging to organizations hereafter mustered out of the service who have

served honestly and faithfully within the limits of the United States shall be paid one month's extra pay on muster out and discharge from the service, from any money in the Treasury not otherwise appropriated: * * * *Sec. 1, act of Jan. 12, 1899 (30 Stat. 784).*

That the Act of January twelfth, eighteen hundred and ninety-nine, be, and it is hereby, amended so as to authorize the payment to the legal heirs or representatives of the officers and enlisted men who died or were killed or who may die in the service, the extra pay provided for in that Act for officers and enlisted men who have been or are to be mustered out. *Act of Mar. 3, 1899 (30 Stat. 1074), amending the act of Jan. 12, 1899 (30 Stat. 784).*

The terms of the act of Jan. 12, 1899, may be regarded as applicable to officers and enlisted men in the volunteer service at any time thereafter, as well as to those actually in the service at the time of its passage.

The provisions of the act were extended to certain officers and enlisted men of volunteers who had been discharged previously, by provisions of act of May 26, 1900 (31 Stat. 217). These provisions are omitted as temporary merely, and executed.

By act of Mar. 3, 1899 (30 Stat. 1073), a bonus of a like amount was granted to soldiers who enlisted in the Regular Army for the duration of the Spanish-American war, to be paid upon discharge.

Volunteer forces are not included in the Army of the United States, by sec. 1, act of June 3, 1916, as amended by the act of June 4, 1920 (41 Stat. 759), post 2113.

Notes of Decisions.

Right to pay in general.—It is well settled that volunteer officers and enlisted men are entitled to be paid up to the time of their discharge or muster out, and are entitled to be discharged or mustered out at the place where they were enrolled. *Daggett v. U. S. (1904), 39 Ct. Cl. 200.*

Right to extra pay.—This section imposes but two conditions upon the right of an officer or soldier who served in the war with Spain to receive the extra pay which it grants, which are that he was honorably discharged and that he was discharged without furlough. Hence the colonel of a regiment, to whom no leave of absence was granted, and who remained at the place of regimental enrollment in command of officers and men detailed for guard, and in charge of the regimental property, while the remainder of the regiment were absent on furlough, is entitled to the extra pay given by this section. *Hunt v. U. S. (1903), 38 Ct. Cl. 704.*

This section extends only to the pay which an officer or soldier would have received if his regiment had not been furloughed. *Terrell v. U. S. (1904), 40 Ct. Cl. 78.*

The act is prospective, and extends to volunteers subsequently enlisted under act of Mar. 2, 1889. *Clark v. U. S. (1901), 37 Ct. Cl. 60.*

A soldier, discharged before the muster out of his regiment, is not entitled to the two months' extra pay. *Clark v. U. S. (1901), 37 Ct. Cl. 60.*

Staff officers.—The provision in act of May 26, 1900 (31 Stat. 217), extending

this section to officers of the general staff, was prospective, and applicable to all officers thereafter mustered out. *Repetil v. U. S. (1905), 40 Ct. Cl. 240.*

Officers discharged by operation of law.—An officer discharged by operation of law is not entitled to subsequent pay because he is detained under arrest awaiting the promulgation of a sentence of dismissal. *Welch v. U. S. (1908), 43 Ct. Cl. 324.*

Officers dismissed.—An officer dismissed on sentence of a court-martial is not entitled to the two months' extra pay. *Welch v. U. S. (1908), 43 Ct. Cl. 324.*

Discharge for purpose of reentering Army.—This section extends only to those who actually sever their connection with the military service. Hence an officer discharged merely that he may continue in the service under an appointment in the regular army is not entitled to the extra pay. *Hull v. U. S. (1903), 38 Ct. Cl. 407.*

Furloughs in general.—A furlough must be deemed to have been withheld or suspended whenever it appears that orders by superior authority have interfered with the personal freedom of the officer or soldier to dispose of his own time. And an officer who did not receive leave of absence, but was detained for duty and actually performed duty during the furlough period, except while on sick leave, is entitled to the full two months' pay. *Magurn v. U. S. (1904), 39 Ct. Cl. 416.*

The status of a soldier at the time when the furlough period began governs his right to pay. *Legg v. U. S. (1904), 40 Ct. Cl. 115.*

Sickness during furlough period.—A soldier who is sick during the whole furlough period can not be considered as having received the furlough, and he is entitled to extra pay. *Legg v. U. S.* (1904), 40 Ct. Cl. 115; *Mitchell v. Same* (1905), 41 Ct. Cl. 30. But if he became sick after the furlough period began and after he had received his furlough, he can not be considered as then on duty, and is not entitled to extra pay. *Legg v. U. S.* (1904), 40 Ct. Cl. 115.

Officer not on duty.—Where an officer served beyond the limits of the United States and was entitled to two months' extra pay, he is not entitled to recover for days during which he was on actual pay, but not on duty. *Repetti v. U. S.* (1905), 40 Ct. Cl. 240.

Officer under waiting orders.—A staff officer ordered home, there to be discharged and placed on waiting orders, is entitled to his regular pay until he reaches his home, though delayed by sickness; and where his pay under waiting orders does not amount to the extra pay to which he would be entitled under this section, he is entitled to the difference. *Daggett v. U. S.* (1904), 39 Ct. Cl. 209.

Officer resigning.—An officer who resigned subsequent to a general order for mustering out, but before the issue of the specific order for the muster out of his regiment, is entitled to the extra pay. *Bishop v. U. S.* (1906), 41 Ct. Cl. 151.

Amount of extra pay.—A volunteer officer who has been given the two months' extra pay for service outside the United States, on muster out and discharge, is not entitled to the one month's extra pay for service within the United States. *U. S. v. Brown* (1907), 27 Sup. Ct. 620, 621, 206 U. S. 240, 51 L. Ed. 1046; affirming (1906) 41 Ct. Cl. 275.

Promotion during furlough period.—Where an officer detained for special duty was promoted during the furlough period of his regiment, he could not recover the pay of the rank which he held when mustered out, but only the pay of the rank which he actually held during the furlough period. *Terrell v. U. S.* (1904), 40 Ct. Cl. 78.

Discharge.—The refusal of a certificate of honorable discharge to a volunteer officer as of the date when his regiment was mustered out, on the mistaken ground that he had already legally been dishonorably discharged, can not be regarded as an active retention of such officer in the service, so as to entitle him to pay after that date, in view of the requirement of the act of Jan. 12, 1899, that, as far as practicable, the discharge of officers and men should take effect at the muster out of the organization to which they belonged. *U. S. v. Brown* (1907), 27 Sup. Ct. 620, 621, 206 U. S. 240, 51 L. Ed. 1046, affirming (1906) 41 Ct. Cl. 275.

The fifty-eighth Pennsylvania regiment of militia was not in the military service of the United States in such sense as to entitle an officer of that regiment to a certificate of discharge from the United States. (1895) 21 Op. Att. Gen. 130.

Operation and effect in general.—Under the act of Mar. 3, 1899, death in the service is equivalent of discharge or muster out. An officer in the Regular Army, serving in the United States volunteers and dying from wounds received in battle, was discharged by death, and passed out of both the regular and volunteer service; and the right of the heirs or legal representatives, upon the death of the officer, is the same as his right would have been if he had lived to be discharged. *Wallace v. U. S.* (1906), 41 Ct. Cl. 352.

1700. Additional pay of enlisted men decorated.—That each enlisted man of the Army to whom there has been or shall be awarded a medal of honor, a distinguished-service cross, or a distinguished-service medal shall, for each such award, be entitled to additional pay at the rate of \$2 per month from the date of the distinguished act or service on which the award is based, and each bar, or other suitable device, in lieu of a medal of honor, a distinguished-service cross, or a distinguished-service medal, as hereinafter provided for, shall entitle him to further additional pay at the rate of \$2 per month from the date of the distinguished act or service for which the bar is awarded, and said additional pay shall continue throughout his active service, whether such service shall or shall not be continuous; but when the award is in lieu of the certificate of merit, as provided for in section three hereof, the additional pay shall begin with the date of the award. *Act of July 9, 1918 (40 Stat. 871), making appropriations for the support of the Army.*

The award of the certificate of merit for distinguished service was discontinued, and additional pay for holders thereof was not to be paid them beyond the date of the

award of the distinguished service medal in lieu thereof, by act of July 9, 1918 (40 Stat. 871).

1701. Pay of persons on the medal of honor roll.—That each such surviving person whose name shall have been entered on said roll in accordance with this Act shall be entitled to and shall receive and be paid by the Commissioner of Pensions in the Department of the Interior, out of any moneys in the Treasury of the United States not otherwise appropriated, a special pension of \$10 per month for life, payable quarter yearly. The Commissioner of Pensions shall make all necessary rules and regulations for making payment of such special pensions to the beneficiaries thereof.

Such special pension shall begin on the day that such person shall file his application for enrollment on said roll in the office of the Secretary of War or of the Secretary of the Navy after the passage and approval of this Act, and shall continue during the life of the beneficiary.

Such special pension shall not deprive any such special pensioner of any other pension or of any benefit, right, or privilege to which he is or may hereafter be entitled under any existing or subsequent law, but shall be in addition thereto.

The special pension allowed under this Act shall not be subject to any attachment, execution, levy, tax, lien, or detention under any process whatever. * * * *Sec. 3, act of April 27, 1916 (39 Stat. 54).*

* * * *And provided further,* That all allowances made, or hereafter to be made, to medal of honor pensioners under the Act of Congress approved April twenty-seventh, nineteen hundred and sixteen, shall be paid from the moneys appropriated for the payment of invalid and other pensions, and section three of the said Act of April twenty-seventh, nineteen hundred and sixteen, is amended accordingly. *Act of June 30, 1916 (39 Stat. 242).*

1702. Rank not considered in awarding medal of honor pensions.— * * * Rank in the service shall not be considered in applications filed hereunder. *Sec. 4, act of April 27, 1916 (39 Stat. 54).*

1703. Only one medal of honor pension.—That in case any person has been awarded two or more medals of honor, he shall not be entitled to and shall not receive more than one such special pension. * * * *Sec. 4, act of April 27, 1916 (39 Stat. 54).*

1704. Pay of retired enlisted men.—That when an enlisted man has served as such thirty years in the United States Army or Marine Corps, either as private or noncommissioned officer, or both, he shall by application to the President be placed on the retired list hereby created, with the rank held by him at the date of retirement, and he shall receive thereafter seventy-five per centum of the pay and allowances of the rank upon which he was retired: *Provided,* That if said enlisted man had war service with the Army in the field, or in the Navy or Marine Corps in active service, either as volunteer or regular, during the war of the rebellion, such war service shall be computed as double time in computing the thirty years necessary to entitle him to be retired. *Act of Feb. 14, 1885 (23 Stat. 305), as amended by act of Sept. 30, 1890 (26 Stat. 504).*

This act, as originally enacted, did not contain the proviso.

The above provisions down to the proviso apply only to soldiers retired prior to Mar. 2, 1907, being superseded by 1705, post.

Notes of Decisions.

Pay and allowances.—Clothing and subsistence, which every enlisted man is entitled to receive so long as he remains in the service, are really payment in kind; and the term "allowances" in this section was used to secure to the retired soldier three-fourths of his entire personal pay, including clothing and subsistence. *Lander v. U. S.* (1895), 30 Ct. Cl. 311.

A retired soldier is entitled to three-fourths of his "service ration"; but he is

not entitled to commutation for things which in service he enjoyed only in common with others, such as medicine, medical services, fuel, and quarters. *McKenna v. U. S.* (1888), 23 Ct. Cl. 308.

Increased pay.—A retired enlisted man held not entitled to increase of pay in time of war, nor to the pay given for reenlistment. *Murphy v. U. S.* (1903), 38 Ct. Cl. 511.

1705. Pay and allowances of retired enlisted men.—That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: Nine dollars and fifty cents per month in lieu of rations and clothing and six dollars and twenty-five cents per month in lieu of quarters, fuel, and light: *Provided*, That in computing the necessary thirty years' time all service in the Army, Navy, and Marine Corps shall be credited. *Sec. 1, act of Mar. 2, 1907 (34 Stat. 1217).*

This act superseded, to a great extent, the previous provisions for retirement of enlisted men of act of Feb. 14, 1885, ante 1704, and act of Mar. 16, 1896, post 1818.

Payment to retired enlisted men, who were in the employment of the Isthmian Canal Commission, of salaries and wages, in addition to their retired pay, was authorized by a provision of sec. 1, act of Mar. 4, 1909 (35 Stat. 931), which is omitted as temporary merely.

Notes of Decisions.

Effect of retirement.—Enlisted men, after retirement, are not a part of the Army, and are therefore not entitled to increased pay given to enlisted men in time

of war. See also *U. S. v. Union Pacific R. Co.* (1919), 249 U. S. 354; *Murphy v. U. S.* (1903), 38 Ct. Cl. 511; *Id.* (1904), 39 Ct. Cl. 178.

1706. Retired enlisted men, temporarily commissioned.— * * * Retired enlisted men who have served honorably as commissioned officers of the United States Army at some time between April 6, 1917, and November 11, 1918, including those who have been placed on the retired list during the World War, and who have been or may hereafter be discharged from their temporary commissions, shall receive the retired pay and allowances of warrant officers on the retired list, as provided in this Act. * * * *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 786).*

See 1609, ante.

1707. Pay of volunteer forces and the National Guard in active service.—In all matters relating to the pay and allowances of officers and soldiers of the Army of the United States, the same rules and regulations shall apply to the Regular Army and to volunteer forces mustered into the service of the United States for a limited period. *R. S. 1292.*

That all officers and enlisted men of the Volunteer Army, and of the militia of the States when in the service of the United States, shall be in all respects on the same footing as to pay, allowances, and pensions as that of officers and enlisted men of corresponding grades in the Regular Army. *Sec. 12, act of Apr. 22, 1898 (30 Stat. 363).*

That all officers and enlisted men of the volunteer forces shall be in all respects on the same footing as to pay, allowances, and pensions as officers and

enlisted men of corresponding grades in the Regular Army. *Sec. 13, act of April 25, 1914 (38 Stat. 351).*

* * * Officers and enlisted men while in the service of the United States under the terms of this section shall have the same pay and allowances as officers and enlisted men of the Regular Army of the same grades and the same prior service. * * * *Sec. 111, act of June 3, 1916 (39 Stat. 211), as amended by sec. 49, act of June 4, 1920 (41 Stat. 784).*

* * * *Provided further*, That members of the National Guard who have or shall become entitled for a continuous period of less than one month to Federal pay at the rates fixed for the Regular Army, whether by virtue of a call by the President, of attendance at school or maneuver, or of any other cause, and whose accounts have not yet been settled, shall receive such pay for each day of such period; and the thirty-first day of a calendar month shall not be excluded from the computation: * * * *Act of June 5, 1920 (41 Stat. 973), making appropriations for the support of the Army: National Guard.*

Provisions relating to the rank of officers of the Volunteer service during the War of the Rebellion, as affected by the date of muster into the service, and to their rights and the rights of their heirs or legal representatives to pay, emoluments, and pension, were made by act of Feb. 24, 1897 (29 Stat. 593). But no claims were to be allowed or considered under said act after Jan. 1, 1911, by a provision of act of Apr. 19, 1910 (38 Stat. 324), and it is therefore omitted as no longer practically operative.

It is not the view of the Judge Advocate General that sec. 111 of the national defense act (post, 2548) repealed the provisions for the "call" of the national guard, in secs. 4-6, 10, act of Jan. 21, 1903 (32 Stat. 776), amended by secs. 4-5, act of May 27, 1908 (35 Stat. 400);

"Whenever the United States is invaded, or in danger of invasion from any foreign nation, or of rebellion against the authority of the Government of the United States, or the President is unable with the regular forces at his command to execute the laws of the Union, it shall be lawful for the President to call forth such number of the militia of the State or of the States or Territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose, through the governor of the respective State or Territory, or through the commanding general of the militia of the District of Columbia, from which State, Territory, or District such troops may be called, to such officers of the militia as he may think proper."

"Whenever the President calls forth the organized militia of any State, Territory, or of the District of Columbia, to be employed in the service of the United States, he may specify in his call the period for which such service is required, and the militia so called shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the President: *Provided*, That no commissioned officer or enlisted man of the organized militia shall be held to service beyond the term of his existing commission or enlistment: *Provided further*, That when the military needs of the Federal Government arising from the necessity to execute the laws of the Union, suppress insurrection, or repel invasion, can not be met by the regular forces, the organized militia shall be called into the service of the United States in advance of any volunteer force which it may be determined to raise."

"When the militia of more than one state is called into the actual service of the United States by the President he may, in his discretion, apportion them among such States or Territories or to the District of Columbia according to representative population."

"The militia, when called into the actual service of the United States shall during their time of service, be entitled to the same pay and allowances as are or may be provided by law for the Regular Army."

Notes of Decisions.

Scope and purpose of R. S. 1292.—Officers and soldiers of the Regular Army and the officers and soldiers of the Volunteer forces mustered into service shall, in the

matter of pay and allowances, be subject to the same rules and regulations. In that matter the Regular and Volunteer are to stand on an equal footing. The provision

is intended to apply only when both forces are in the service. (1877) 15 Op. Atty. Gen. 330; (1882) 17 Op. Atty. Gen. 402.

Construction in general of section 13, act of Apr. 22, 1898.—This section, being supplemental legislation, was in the nature of a recognition of an equitable claim to reimbursement for services which were rendered after enlistment and before muster in or acceptance of their commissions, and has reference only to Volunteers under act of Apr. 22, 1898. It did not impliedly amend sec. 2301, post, nor change the military system of the United States. (1901) 23 Op. Atty. Gen. 406.

Application of constitution and laws.—Const. art. 1, sec. 8, cl. 15, which confers power upon Congress to provide for the calling forth of the militia to execute the law of the United States, and act of Feb. 28, 1795, applies to the States. *U. S. v. Stewart* (C. C. 1857), Fed. Cas. No. 16,401a.

Necessity of call.—The President alone is made the judge of the necessity of calling the militia into the service of the United States. *Martin v. Mott* (1827), 25 U. S. (12 Wheat.) 19, 6 L. Ed. 537; *Vanderheyden v. Young* (N. Y. 1814), 11 Johns. 150.

The commanders in chief of the militia of the several States have a right to determine whether any of the exigencies contemplated by the Constitution of the United States exist, so as to require them to place the militia, or any part of it, in the service of the United States, at the

request of the President, to be commanded by him, pursuant to acts of Congress. In re *Opinion of the Judges* (1812), 8 Mass. 549.

Delegation of power.—The power of the President may be exercised by his delegate, i. e., a general commanding in chief in a particular district, and all citizens subject to militia duty may thereby be placed under military law; but this is the extent of martial law, and all beyond is usurpation. *Johnson v. Duncan* (La. 1815), 3 Mart. (O. S.) 530, 6 Am. Dec. 675.

Foreign service.—The President has no authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation. (1912) 29 Op. Atty. Gen. 322.

Draft.—The provisions of act July 17, 1862, authorizing the President to make the necessary rules and regulations for drafting the militia, in cases where the laws of the States had not made a sufficient provision for that purpose, are valid. The legislative power is not delegated thereby. In re *Griner* (1863), 16 Wis. 423; In re *Wehlitz* (1863), 16 Wis. 443, 84 Am. Dec. 700.

Longevity pay.—For decisions of the Comptroller of the Treasury respecting the right of members of the National Guard drafted into the Federal Service under sec. 111, act of June 3, 1916, as unamended (39 Stat. 211), to longevity pay, see notes to 1637, ante.

1708. Beginning of pay of militia in active service.—That when the militia is called into the actual service of the United States, or any portion of the militia is called forth under the provisions of this Act, their pay shall commence from the day of their appearance at the place of company rendezvous, but this provision shall not be construed to authorize any species of expenditure previous to arriving at such places of rendezvous which is not provided by existing laws to be paid after their arrival at such places of rendezvous. *Sec. 11, act of Jan. 21, 1903* (32 Stat. 776), as amended by sec. 7, act of May 27, 1908 (35 Stat. 401).

This section, as originally enacted, provided for pay when "any portion of the militia is accepted under the provisions of this act." The word "accepted" was changed to "called forth," by amendment as cited above.

That portion of this section was probably superseded by sec. 111 of the national defense act of June 3, 1916 (39 Stat. 211), providing for drafting the National Guard when authorized by Congress.

Notes of Decisions.

Pay.—Soldiers were entitled to be paid from the date of their enrollment and joining for duty antecedent to their being mustered in, but payment by a State, reimbursed by the United States, extinguishes the liability to the soldier. *Burnham v. U. S.* (1905), 40 Ct. Cl. 166. See, also,

Hovey v. Same, Id. 390; *State of New Jersey v. Same*, Id. 493.

The enrollment referred to in the provision that the pay of officers and enlisted men shall begin on the day "on which they had their names enrolled" can not anticipate the action of the governor, and the

pay of such Volunteers does not begin until the governor designates the battalion or company to be called out and the Volunteer is enrolled therein and joins his command. (1902) *Foreman v. U. S.*, 37 Ct. Cl. 226.

Expenses.—Expenses of the militia in time of war, under requisition of the United

States, are properly payable by them; and if the State of Virginia, by the adoption of an act, consented to advance any portion of those expenses, it is under no legal or moral obligation to pay more. *Commonwealth v. Pierce* (Va. 1826), 4 Rand. 432.

1709. Pay prior to muster-in of persons enlisted to fulfil minimum war strength of National Guard units.— * * * *Provided further*, That nothing in this Act or previous Acts of Congress shall be construed to prohibit the paying of men enlisted by State authorities of any State for militia organization for the purpose of bringing said organization up to the minimum necessary to permit of the muster in of said organization, from the date of such enlistments to the date of muster in or from date of enlistment to date of rejection, after physical examination. *Act of Aug. 29, 1916* (39 Stat. 624), *making appropriations for the support of the Army*.

1710. Pay and allowances of temporary forces.—That all officers and enlisted men of the forces herein provided for other than the Regular Army shall be in all respects on the same footing as to pay, allowances, and pensions as officers and enlisted men of corresponding grades and length of service in the Regular Army; * * * *Sec. 10, act of May 18, 1917* (40 Stat. 82).

See 1707, ante.

The forces referred to above were the drafted forces and the National Guard in Federal service.

1711. Pay and allowances of Army field clerks.— * * * *Provided*, That Army field clerks shall have the same allowances and benefits as heretofore allowed by law to pay clerks, Quartermaster Corps, not including retirement: *Provided, however*, That the minimum or entrance pay exclusive of said allowances, of said Army field clerks shall be \$1,200 per annum: *Provided further*, That Army field clerks shall receive the same increase of pay for service beyond the continental limits of the United States as is allowed by law to commissioned officers of the Army: *And provided further*, That the Secretary of War is authorized to employ, during the present emergency and for a period not exceeding four months thereafter, such additional Army field clerks as may be necessary, not exceeding 4,272. *Act of July 11, 1919* (41 Stat. 111), *making appropriations for the support of the Army*.

* * * Hereafter no appointments as Army field clerks or field clerks, Quartermaster Corps, shall be made. * * * *Sec. 4a, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920* (41 Stat. 761).

Prior to the enactment of the act of July 11, 1919, the rights of Army field clerks were defined by the act of Aug. 29, 1916 (39 Stat. 625), as follows: "Hereafter headquarters clerks shall be known as Army field clerks and shall receive pay at the rates herein provided, and after twelve years of service, at least three years of which shall have been on detached duty away from permanent station, or on duty beyond the continental limits of the United States, or both, shall receive the same allowances, except retirement, as heretofore allowed by law to pay clerks, Quartermaster Corps, and shall be subject to the rules and articles of war."

Notes of Decisions.

Status of Army field clerks.—Army field clerks may be appointed by The Adjutant General, without respect to the rules and regulations of the Civil Service Commission, and from the date of their appointment

they are solely within the control of the Rules and Articles of War and not subject to the rules and regulations of the Civil Service Commission. 31 Op. Atty. Gen. 133.

1712. Increase in pay of field clerks.— * * * *Provided*, That Army field clerks and field clerks Quartermaster Corps, whose total pay and allowances do not exceed \$2,500 per annum, shall be paid an increase at the rate of \$240 per annum: *Provided further*, That such Army field clerks and field clerks Quartermaster Corps, whose total pay and allowances exceed \$2,500 but do not exceed \$2,740 per annum, shall be paid such additional amount as will make their total pay and allowances not to exceed \$2,740 per annum: *Provided further*, That this section shall not be construed to reduce the pay and allowances of any Army field clerk or field clerk Quartermaster Corps. *Sec. 5, act of May 18, 1920 (41 Stat. 602).*

1713. Pay and allowances of field clerks, Quartermaster Corps.—Hereafter not to exceed two hundred clerks, Quartermaster Corps, who shall have had twelve years of service, at least three years of which shall have been on detached duty away from permanent stations, or on duty beyond the continental limits of the United States, or both, shall be known as field clerks, Quartermaster Corps, and shall receive the same allowances, except retirement, as heretofore allowed by law to pay clerks, Quartermaster Corps, and shall be subject to the rules and articles of war. *Act of Aug. 29, 1916 (39 Stat. 625).*

Hereafter the pay and allowances of Army paymasters' clerks shall be the same as provided by law for Navy paymasters' clerks on shore duty, and they shall also be entitled to the same right of retirement with the same retired pay as is now allowed Navy paymasters' clerks: *Provided*, That Army paymasters' clerks shall be subject to the rules and articles of war. *Act of Mar. 3, 1911 (36 Stat. 1044), making appropriations for the support of the Army.*

This provision of act of Aug. 29, 1916, was accompanied by a proviso that said clerks "shall be employed and assigned by the Secretary of War to the offices and positions in which they are to serve." *Act Aug. 29, 1916 (39 Stat. 626).*

Navy paymasters' clerks were to receive the same pay and allowances and have the same rights of retirement as warrant officers of like length of service in the Navy, by a provision of act of May 13, 1908, as amended by act of June 24, 1910.

Army paymasters' clerks were to receive mileage at the same rates, etc., as officers of the Army, by a provision of sec. 1, act of Aug. 24, 1912, ante, 543.

The age limit for the retirement of paymasters' clerks was to be same as for commissioned officers of the Army, by a further provision of said act of Aug. 24, 1912 (37 Stat. 575).

In connection with provisions relating to accounts of officers of the Pay Department, the assignment to duty in the office of the Paymaster General of five paymasters' clerks was authorized by a provision of act of Mar. 2, 1905, ante, 1594.

Provisions for paymasters' clerks including the employment of citizens as clerks, were made by R. S. 1190. They were continued, to be known as pay clerks, by a provision of sec. 3, act of Aug. 24, 1912, ante, 703. But no further appointments of pay clerks shall be made, by a provision of act of Mar. 2, 1913 (37 Stat. 708).

By a provision of act of Aug. 29, 1916 (39 Stat. 644), the President was authorized to appoint, and, by and with the advice and consent of the Senate, to commission to the grade of first lieutenant in the Quartermaster Corps, a pay clerk of over 31 years' service, in active service, and recommended by the then Secretary of War for such appointment.

For historical sketch of Pay Department, see Historical Note at head of chap. 19.

Appropriation for the pay of the above clerks is regularly made by the annual Army appropriation act.

Notes of Decisions.

Field clerks, Quartermaster Corps.—The act of Aug. 29, 1916 (39 Stat. 625), changed the designation of clerk, Quartermaster Corps, to field clerk. No new office was created by the act, and Executive action

was unnecessary to determine the status of its beneficiaries. It was intended that the clerks named should receive the allowances from the date of the approval of the act. *Charlebois v. U. S. (1919), 54 Ct. Cl. 183.*

Civilian employees.—Prior to the amendment to this section authorizing the employment of civilian employees as paymaster's clerks, the Attorney General held that there was no provision of law authorizing the employment of persons for clerks to paymasters other than noncommissioned officers, but that the department, in the

exercise of its general powers, might allow a private citizen to be employed when no capable noncommissioned officer could be obtained. (1837) 3 Op. Atty. Gen. 242.

Pay of clerks under prior laws.—See (1837) 3 Op. Atty. Gen. 242; (1842) 4 Op. Atty. Gen. 94.

1714. Contract surgeons.— * * * *Provided*, That contract surgeons of the Army serving full time shall receive the pay of a second lieutenant. *Sec. 1, act of May 18, 1920 (41 Stat. 602).*

1715. Pay of the Army Nurse Corps.—That the annual rate of pay of the members of said corps shall be as follows: Superintendent, \$2,400; assistant superintendents and directors, \$1,800; assistant directors, \$1,500; chief nurses, \$120 in addition to the pay of a nurse; nurses, \$720 for the first period of three years' service, \$780 for the second period of three years' service, \$840 for the third period of three years' service, \$900 for the fourth period of three years' service, and \$960 after twelve years' service in said corps (including in all cases time of service as contract nurse); reserve nurses, when upon active duty, will receive the same pay as nurses who have served in the corps for periods corresponding to the full period of their active service; and all members of said corps, in addition to the foregoing, the sum of \$10 per month when serving beyond the continental limits of the United States (excepting Porto Rico and Hawaii). *Sec. 4, chap. V, act of July 9, 1918 (40 Stat. 879).*

1716. Pay of chief nurses.—That section four of Chapter V of an Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and nineteen," approved July ninth, nineteen hundred and eighteen, be, and the same hereby is, amended, to be effective as of and from July ninth, nineteen hundred and eighteen, by changing the clause "chief nurses, \$120, in addition to the pay of a nurse," to "chief nurses, \$360, in addition to the pay of a nurse." *Act of Feb. 28, 1919 (40 Stat. 1211), amending sec. 4, chap. V, act of June 3, 1916 (39 Stat. 879).*

1717. Pay of Army Nurse Corps when on leave.—That members of said Nurse Corps shall be entitled to cumulative leave of absence with pay at the rate of thirty days for each calendar year of service in said corps, not exceeding, however, one hundred and twenty days at one time, and in addition thereto sick leave not exceeding thirty days in any one calendar year in cases of illness or injury incurred in the line of duty. *Sec. 5, chap. V, act of July 9, 1918 (40 Stat. 879).*

Sec. 7 of this act (40 Stat. 880), repealed act of Mar. 4, 1912 (37 Stat. 72), which provided as follows: "The superintendent and members of the Female Nurse Corps when serving in Alaska or at places without the limits of the United States may be allowed the same privileges in regard to cumulative leaves of absence and method of computation of same as are now allowed by law to Army officers so serving."

1718. Pay of cooks and other civilians caring for the sick.— * * * for the pay of male and female nurses, not including the Army Nurse Corps, and of cooks and other civilians employed for the proper care of sick officers and soldiers, under such regulations fixing their number, qualifications, assignments, pay, and allowances as shall have been or shall be prescribed by the Secretary of War; * * * *Act of June 5, 1920 (41 Stat. 967-968), making appropriations for the support of the Army: Medical Department.*

Similar provisions have appeared in previous acts making appropriations for the support of the Army.

1719. Pay and allowances of hospital matrons.—Hospital matrons in post and regimental hospitals shall receive ten dollars a month * * *. One ration in kind or by commutation shall be allowed to each. *R. S. 1277.*

The words "and nurses," omitted here, were superseded by the provisions establishing the Nurse Corps, and providing for the pay and allowances, quarters, subsistence, etc., of nurses. Secs. 18, 19, of act of Feb. 2, 1901 (31 Stat. 753), and subsequent statutes.

1720. Voluntary allotments of pay.—The Secretary of War is hereby authorized to permit, under such regulations as he may prescribe, any officer or enlisted man on the active list of the Army, any retired officer or enlisted man of the Army on active duty, and any permanent civilian employee under the jurisdiction of the War Department on duty outside of the continental limits of the United States, to make allotments of his pay for the support of his wife, children, or dependent relatives, or for such other purposes as the Secretary of War may deem proper. * * * *Sec. 16, act of Mar. 2, 1899 (30 Stat. 981), as amended by act of Oct. 6, 1917 (40 Stat. 385).*

That the enlisted man may allot any proportion or proportions or any fixed amount or amounts of his monthly pay or of the proportion thereof remaining after the compulsory allotment, for such purposes and for the benefit of such person or persons as he may direct, subject, however, to such conditions and limitations as may be prescribed under regulations to be made by the Secretary of War and the Secretary of the Navy, respectively. *Sec. 202, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 403).*

Notes of Decisions.

<p>Forfeiture of pay.—Liberty Loan allotments of pay made by an enlisted man are not affected by the sentence of a</p>	<p>court-martial imposing forfeiture of pay. (1918) 24 Comp. Dec. 621.</p>
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1721. Allotment of pay compulsory for enlisted men.—That the provisions of this article shall apply to all enlisted men in the military or naval forces of the United States, except the Philippine Scouts, the insular force of the Navy, and the Samoan native guard and band of the Navy. *Sec. 200, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 402), as amended by sec. 3, act of June 25, 1918 (40 Stat. 610).*

1722. Dependents entitled to allotment of pay.—That allotment of pay shall, subject to the conditions, limitations, and exceptions hereinafter specified, be compulsory as to wife, a former wife divorced who has not remarried and to whom alimony has been decreed, and a child, and voluntary as to any other person; but on the written consent of the wife or former wife divorced, supported by evidence satisfactory to the bureau of her ability to support herself and the children in her custody, the allotment for her and for such children may be waived; and on the enlisted man's application or otherwise for good cause shown, exemption from the allotment may be granted upon such conditions as may be prescribed by regulations. * * * *Sec. 201, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 402).*

1723. Maximum compulsory allotment of pay.—The monthly compulsory allotment shall be \$15. For a wife living separate and apart from her husband under court order or written agreement, or for a former wife divorced, the monthly compulsory allotment shall not exceed the amount specified in the court order, decree, or written agreement to be paid to her, * * * *Sec. 201, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 402), as amended by sec. 4, act of June 25, 1918 (40 Stat. 610).*

The original act provided as follows:

"The monthly compulsory allotment shall be in an amount equal to the family allowance hereinafter specified except that it shall not be more than one-half the pay, or less

than \$15; but for a wife living separate and apart under court order or written agreement or for a former wife divorced, it shall not exceed the amount specified in the court order, decree, or written agreement to be paid to her."

Notes of Decisions.

Forfeiture of pay.—The monthly compulsory allotment of pay under this section is not affected by the sentence of a court-martial imposing a forfeiture of pay. (1918) 24 Comp. Dec. 621.

1724. Limitation on allotment of pay to an illegitimate child.— * * * and for an illegitimate child, to whose support the father has been judicially ordered or decreed to contribute, it shall not exceed the amount fixed in the order or decree. * * * *Sec. 201, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 403), as amended by sec. 4, act of June 25, 1918 (40 Stat. 610).*

Sec. 9 of the act of June 25, 1918 (40 Stat. 611), provided that sec. 4, cited above, should become effective July 1, 1918.

1725. Limitation on allotment of pay to a former wife divorced.— * * * If there is a compulsory allotment for a wife or child, then a former wife divorced who has not remarried and to whom alimony has been decreed, shall not be entitled to a compulsory allotment, but shall be entitled to a family allowance as hereinafter provided. *Sec. 201, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 403), as amended by sec. 4, act of June 25, 1918 (40 Stat. 610).*

The original act provided as follows:

"If there be an allotment for a wife or child, a former wife divorced and who has not remarried shall be entitled to a compulsory allotment only out of the difference, if any, between the allotment for the wife or child or both and one-half of the pay."

1726. Presumption of marriage.— * * * *Provided further,* That for the purpose of the administration of Article II of this Act marriage shall be conclusively presumed, in the absence of proof, that there is a legal spouse living, if the man and woman have lived together in the openly acknowledged relation of husband and wife during the two years immediately preceding the date of the declaration of war, or the date of enlistment or of entrance into or employment in active service in the military or naval forces of the United States if subsequent to such declaration. *Sec. 22 (5), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 401).*

1727. Discontinuance of compulsory allotment of pay.—That all family allowances and allotments payable by the Bureau of War Risk Insurance under the authority of this article shall be discontinued at the end of the fourth calendar month after the termination of the present war emergency, as declared by proclamation of the President of the United States, and thereafter all allotments of pay shall be voluntary and shall be made under such regulations as may be prescribed by the Secretary of War and the Secretary of the Navy, respectively. *Sec. 211, added to the act of Sept. 2, 1914, by sec. 9, act of Dec. 24, 1919 (41 Stat. 372).*

1728. Allotment of pay of enlisted men missing in action.—For the purpose of the payment of allotments made by the enlisted men or the payment of family allowances under Article II of the Act of October 6, 1917, as amended, an enlisted man reported as missing in action shall be considered as occupying a pay status until his actual status has been determined by proper official authority of the department in which the man served or is serving: *Provided,* That payments authorized hereunder shall not continue for more than one year. *Act of Nov. 4, 1918 (40 Stat. 1024).*

1729. Resumption of discontinued allotments of pay.—That in all of those cases in which an authority of allotment by an enlisted man directing the payment of an indicated amount to a designated beneficiary is on file in the Bureau of War Risk Insurance, and payments pursuant to this authority had been made by said bureau prior to July first, nineteen hundred and eighteen, but which payments were discontinued as of that date, the War and Navy Departments are directed to resume the payments of allotments in these cases, pursuant to the authority on file as aforesaid, pending the receipt of a new authority, or of a written rescission of the old authority from the enlisted man. In those cases in which pending the receipt of the new authority, the military authorities, beginning with July first, nineteen hundred and eighteen, have reserved from month to month out of the soldier's monthly accruing pay, the amount directed to be paid by the original authority of allotment, the War and Navy Departments, upon resuming the payment of allotments in such cases, under the authority of this Act, shall pay all arrearages out of these respective reservations. *Act of Feb. 28, 1919 (40 Stat. 1212).*

1730. Erroneous disbursement of allotments of pay.— * * * All allotments of pay of officers, enlisted men, and civilian employees that have been or shall be paid to designated allottees previous to the receipt by disbursing officer of notice of discontinuance of the same from the officer required by regulations to furnish such notice shall pass to the credit of the disbursing officer who has made or shall make such payments; and, if erroneous payment is made because of the failure of an officer to report, in the manner prescribed by the Secretary of War, the death of the grantor, or any fact which renders the allotment not payable, then the amount of such erroneous payment shall be collected by the Quartermaster General from the officer who fails to make such report, if such collection is practicable. Nothing herein shall be construed to invalidate allotments now in force. *Sec. 16, act of March 2, 1899 (30 Stat. 981), as amended by act of Oct. 6, 1917 (40 Stat. 385).*

This appears to have superseded act of Mar. 2, 1901 (31 Stat. 896), which provided as follows:

"Hereafter all allotments of pay of enlisted men of the United States Army, under section sixteen of act of Congress approved March second, eighteen hundred and ninety-nine, that have been or shall be paid to the designated allottees, after the expiration of one month subsequent to the month in which said allotments accrued, shall pass to the credit of the disbursing officer who has made or shall make such payment: *Provided*, That said disbursing officer shall, before making payment of said allotments, use, or shall have used, due diligence in obtaining and making use of all information that may have been received in the War Department relative to the grantors of the allotments: *And provided further*, That if an erroneous payment is made because of the failure of an officer responsible for such report to report, in the manner prescribed by the Secretary of War, the death of a grantor or any fact which renders the allotment not payable, then the amount of such erroneous payment shall be collected by the Paymaster-General from the officer who fails to make such report, if such collection is practicable."

1731. Family allowances to dependents of soldiers during the Mexican punitive expedition.—That the sum of \$2,000,000 is hereby appropriated out of any money in the Treasury not otherwise appropriated, to be expended under the direction of the Secretary of War, and under such rules and regulations as he may prescribe, for the support of, at a cost of not more than \$50 per month, or so much of said amount as the Secretary of War may deem necessary, and not more than such enlisted man has been contributing monthly to the support of his family at the time of his being called or drafted into the service of the United States or during his enlistment period in the Regular Army at the time

of such call or draft of the Organized Militia or National Guard, the family of each enlisted man of the Organized Militia or National Guard called or drafted into the service of the United States until his discharge from such service, and the family of each enlisted man of the Regular Army until his discharge from active service therein or until the discharge of the Organized Militia or National Guard from such service if such enlisted man is at that time in active service in the Regular Army, which family during the term of service of such enlisted man has no other income, except the pay of such enlisted man, adequate for the support of said family: *Provided*, That the action of the Secretary of War in all cases provided for in this paragraph shall be final, and no right to prosecute a suit in the Court of Claims or in any other court of the United States against the Government of the United States shall accrue to such enlisted man, or to any member of the family of any such enlisted man, by virtue of the passage of this act: *And provided further*, That this paragraph shall not apply to any such enlisted man who shall marry after the fifteenth day of July, nineteen hundred and sixteen; and the word "family" shall include only wife, children, and dependent mothers. *Act of Aug. 29, 1916 (39 Stat. 649). making appropriations for the support of the Army.*

The sum of \$2,000,000, therein appropriated to be expended under the direction of the Secretary of War for the support of the family of each enlisted man of the Organized Militia or National Guard, or of the Regular Army, as therein provided, shall be available to be paid on the basis of and for time subsequent to June eighteenth, nineteen hundred and sixteen, the date of the call by the President, and the time for which such payment shall be made shall correspond with the time of service of the enlisted men, and payment shall be made without reference to the enlisted men having enlisted before or after the call by the President. *Ser. 901, title IX, act of Sept. 8, 1916 (39 Stat. 801), amending act of Aug. 29, 1916 (39 Stat. 694).*

For the support of dependent families of enlisted men, including the same objects and under the same limitations specified in the appropriations for this purpose in the Army appropriation Act for the fiscal year nineteen hundred and seventeen as amended by section nine hundred and one of the Act, entitled "An Act to increase the revenue, and for other purposes," approved September eighth, nineteen hundred and sixteen, \$2,000,000: *Provided*, That the provision in the Act of August twenty-ninth, nineteen hundred and sixteen, as amended by section nine hundred and one of the Act of September eighth, nineteen hundred and sixteen, for the Federal support of families of enlisted men shall, with respect to enlisted men belonging to organizations of the Organized Militia or National Guard which entered the service of the United States under the calls of the President of May ninth, nineteen hundred and sixteen, and June eighteenth, nineteen hundred and sixteen, and enlisted men of the Regular Army who by the provisions of Acts above cited are beneficiaries thereof only during the time the Organized Militia or National Guard continue in the service of the United States under said calls, apply only to applications stated in the form prescribed by the Secretary of War which are received in the office of the Depot Quartermaster, Washington, District of Columbia, on or before June thirtieth, nineteen hundred and seventeen. *Act of Apr. 17, 1917 (40 Stat. 11).*

1732. Maximum amount of family allowance during the World War.—That a family allowance of not exceeding \$50 per month shall be granted and paid by the United States upon written application to the bureau by such enlisted

man or by or on behalf of any prospective beneficiary, in accordance with and subject to the conditions, limitations, and exceptions hereinafter specified. * * * *Sec. 204, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 403).*

For act construed to terminate family allotments and allowances as of July 31, 1921, see 2835, post. See 27 Comp. Dec. 809.

1733. Family allowance for wife and children.—Class A. In the case of a man to his wife (including a former wife divorced) and to his child or children—

- (a) If there is a wife but no child, \$15;
- (b) If there is a wife and one child, \$25;
- (c) If there is a wife and two children, \$32.50, with \$5 per month additional for each additional child;
- (d) If there is no wife, but one child, \$5;
- (e) If there is no wife, but two children, \$12.50;
- (f) If there is no wife, but three children, \$20;
- (g) If there is no wife, but four children, \$30, with \$5 per month additional for each additional child;
- (h) If there is a former wife divorced who has not remarried and to whom alimony has been decreed, \$15. * * *

In the case of a woman, the family allowances for a husband and children shall be in the same amounts, respectively, as are payable, in the case of a man, to a wife and children, provided she makes a voluntary allotment of \$15 as a basis therefor, and provided, further, that dependency exists as required in section two hundred and six. *Sec. 204, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 403), as amended by sec. 6, act of June 25, 1918 (40 Stat. 610-611).*

The original act provided as follows:

"Subject to the conditions, limitations, and exceptions hereinabove and hereinafter specified, the family allowance payable per month shall be as follows:

Class A. In the case of a man, to his wife (including a former wife divorced) and to his child or children:

- (a) If there be a wife but no child, \$15.
- (b) If there be a wife and one child, \$25.
- (c) If there be a wife and two children, \$32.50, with \$5 per month additional for each additional child.
- (d) If there be no wife, but one child, \$5.
- (e) If there be no wife, but two children, \$12.50.
- (f) If there be no wife, but three children, \$20.
- (g) If there be no wife, but four children, \$30, with \$5 per month additional for each additional child."

1734. Compulsory allotment prerequisite to a family allowance.—That family allowances for members of Class A shall be paid only if and while a compulsory allotment is made to a member or members of such class. * * * *Sec. 205, added to the act of Sept. 2, 1914 by sec. 2, act of Oct. 6, 1917 (40 Stat. 404).*

1735. Family allowance for a former wife divorced.— * * * The monthly family allowance to a former wife divorced shall be payable only out of the difference, if any, between the monthly family allowance to the other members of Class A and the sum of \$50, and only then if alimony shall have been decreed to her. * * * *Sec. 205, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 404).*

1736. Family allowance for a wife living apart.— * * * For a wife living separate and apart under court order or written agreement or to a former wife

divorced the monthly allowance, together with the allotment, if any, shall not exceed the amount specified in the court order, decree, or written agreement to be paid to her. * * * *Sec. 205, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 404.)*

1737. Family allowance for an illegitimate child.— * * * For an illegitimate child, to whose support the father has been judicially ordered or decreed to contribute, it shall not exceed the amount fixed in the order or decree. *Sec. 205, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 404).*

1738. Family allowance for a parent, grandchild, brother, or sister.— * * * Class B. In the case of a man or woman to a grandchild, a parent, brother, or sister—

(a) If there is one parent, \$10;

(b) If there are two parents, \$20;

(c) If there is a grandchild, brother, sister, or additional parent, \$5 for each. *Sec. 204, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 403), as amended by sec. 6, act of June 25, 1918 (40 Stat. 610).*

The provisions of the original act were as follows:

"Class B. In the case of a man or woman, to a grandchild, a parent, brother, or sister:

(a) If there be one parent, \$10.

(b) If there be two parents, \$20.

(c) For each grandchild, brother, sister, and additional parent, \$5. In the case of a woman, to a child or children:

(d) If there be one child, \$5.

(e) If there be two children, \$12.50.

(f) If there be three children, \$20.

(g) If there be four children, \$30, with \$5 per month additional for each additional child."

Notes of Decisions.

<p>Forfeiture of pay.—Voluntary allotments under class B are not affected by the sentence of a court-martial imposing</p>	<p>forfeiture of pay. (1918) 24 Comp. Dec. 621.</p>
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1739. Allotment of pay and dependency prerequisite for family allowance.—That family allowances to members of class B shall be paid only if and while the members are dependent in whole or in part on the enlisted man, and then only if and while the enlisted man makes a monthly allotment of his pay for such members in the following amounts:

(a) If an enlisted man is not making a compulsory allotment for class A the allotment for class B required as a condition to the family allowance shall be \$15;

(b) If an enlisted man is making a compulsory allotment for class A the additional allotment for class B required as a condition to the family allowance shall be \$5, or if a woman is making an allotment of \$15 for a dependent husband or child the additional allotment for the other members of class B required as a condition to the family allowance shall be \$5. *Sec. 206, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 404), as amended by sec. 7, act of June 25, 1918 (40 Stat. 611).*

The original provisions of this section were as follows:

"Family allowances to members of Class B shall be granted only if and while the member is dependent in whole or in part on the enlisted man, and then only if and while the enlisted man makes a monthly allotment of his pay for such member or members equal to the amount of the monthly family allowance as hereinabove specified, except that—

(a) The maximum monthly allotment so required to be made to members of Class B shall be one-half of his pay.

(b) If he is making no allotment to a member of Class A, the minimum monthly allotment so designated to be made to members of Class B shall be \$15 per month.

(c) If he is making the compulsory allotment to a member of Class A, the minimum monthly allotment so designated to be made to members of Class B shall be one-seventh of his pay, but not less than \$5 per month."

1740. Limitation on family allowance to a parent, grandchild, brother, or sister.—That the amount of the family allowance to members of Class B shall be subject to each of the following limitations:

(a) If an allowance is paid to one or more beneficiaries of Class A, the total allowance to be paid to the beneficiaries of Class B shall not exceed the difference between the allowance paid to the beneficiaries of Class A and the sum of \$50.

(b) The total monthly allowance to beneficiaries of Class B added to the enlisted man's monthly allotment to them shall not exceed the average sum habitually contributed by him to their support monthly during the period of dependency but not exceeding a year immediately preceding his enlistment or the enactment of this amendatory Act. *Sec. 207, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 404).*

1741. Apportionment of the family allowance.—That as between the members of Class A and as between the members of Class B, the amount of the allotment and family allowance shall be apportioned as may be prescribed by regulations. *Sec. 208, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 404).*

1742. Family allowances of deserters, prisoners, and missing men.— * * * The payment shall be subject to such regulations as may be prescribed relative to cases of desertion and imprisonment and of missing men. * * * *Sec. 204, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 403).*

1743. Duration of the family allowance.—The family allowance shall be paid from time of enlistment to death in or one month after discharge from the service, but not for more than four months after the termination of the present war emergency. No family allowance shall be made for any period preceding November 1, 1917. The payment shall be subject to such regulations as may be prescribed relative to cases of desertion and imprisonment and of missing men. *Sec. 204, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 403), as amended by sec. 8, act of Dec. 24, 1919 (41 Stat. 372).*

For act construed to terminate family allowances as of July 31, 1921, see 2835, post. See 27 Comp. Dec. 809.

1744. Distribution of family allowances by the Treasury Department.—The War and Navy Departments, respectively, shall pay over to the Treasury Department monthly the entire amount of such allotments for distribution to the beneficiaries, and the allotments and family allowances shall be paid by the bureau to or for the beneficiaries. *Sec. 209, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 16, 1917 (40 Stat. 404).*

Funds for payment of family allowances were appropriated by sec. 18, act of Sept. 2, 1914 (40 Stat. 400), act of Nov. 4, 1918 (40 Stat. 1024), and by act of July 19, 1919 (41 Stat. 172).

1745. Award of family allowances after investigation.—That upon receipt of any application for family allowance the commissioner shall make all proper investigations and shall make an award, on the basis of which award the amount of the allotments to be made by the man shall be certified to the War Depart-

ment or Navy Department, as may be proper. Whenever the commissioner shall have reason to believe that an allowance has been improperly made or that the conditions have changed, he shall investigate or reinvestigate and may modify the award. The amount of each monthly allotment and allowance shall be determined according to the family conditions existing on the first day of the month. *Sec. 210, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 404), as amended by sec. 8, act of June 25, 1918 (40 Stat. 611).*

The amendment of this section consisted in the addition of the words, "on the first day of the month."

1746. Refunding of a family allowance by a beneficiary.—That the Act * * * be, and is hereby, amended by adding the following new paragraph to section two hundred and ten of Article II of the said Act:

"*Provided, however, That whenever the commissioner shall by further investigation or reinvestigation modify the existing award, no reimbursement from the person receiving an allowance shall be required for allotments and allowances already paid nor shall any deductions be made from allotments and allowances to be paid in the future for any change in award made in previous allotments and allowances, except where it is conclusively shown that the person receiving the allowance does not bear the relationship to the enlisted man which is required by the Act and except in cases of manifest fraud.*" *Act of Feb. 25, 1919 (40 Stat. 1160), amending sec. 210, added to the act of Sept. 2, 1914 by sec. 2, act of Oct. 6, 1917 (40 Stat. 404).*

1747. Allowances according to statutes.—No allowances shall be made to officers in addition to their pay except as hereinafter provided. *R. S. 1269.*

* * * *Provided, That the allowances and gratuities now authorized by existing law are not changed hereby, except as otherwise specified in this Act. Sec. 14, act of May 18, 1920 (41 Stat. 604).*

Notes of Decisions.

Service on court-martial.—An officer, who while on leave was ordered to serve and did serve on a court-martial, and who upon its adjournment before the expiration of the leave immediately returned to his command, held not entitled to per diem compensation for his service on the court-

martial. (1871) 13 Op. Atty. Gen. 526.

Pay and allowance defined.—Pay is the fixed and direct amount given by law; allowances or emoluments are indirect or contingent remuneration; both are compensation. *Sherburne v. U. S. 16 Ct. Cls., 491.*

1748. Quarters in kind furnished to officers.—That at all posts and stations where there are public quarters belonging to the United States officers may be furnished with quarters in kind in such public quarters, and not elsewhere, by the Quartermaster's Department, assigning to the officers of each grade, respectively, such number of rooms as is stated in the following table, namely: Second lieutenants, two rooms; first lieutenants, three rooms; captains, four rooms; majors, five rooms; lieutenant-colonels, six rooms; colonels, seven rooms; brigadier-generals, eight rooms; major-generals, nine rooms; lieutenant-general, ten rooms: * * * *Sec. 9, act of June 17, 1878 (20 Stat. 151), as amended by act of March 2, 1907 (34 Stat. 1169), making appropriations for the support of the Army.*

As originally enacted, the section provided for furnishing officers with quarters by "assigning to the officers of each grade, respectively, such number of rooms as is now allowed to such grade by the rules and regulations of the Army"; and the proviso annexed thereto prescribed the rate of commutation to be paid at "not exceeding ten

dollars per room per month," and further prescribed rates of commutation for quarters to the General and to the Lieutenant-General. It was amended to read as set forth here, and in the proviso set forth, 1753, post.

1749. Quarters and other allowances of the superintendent of the Army Nurse Corps.— * * * *Provided*, That hereafter the superintendent shall receive such allowances of quarters, subsistence, and medical care during illness as may be prescribed in regulations by the Secretary of War. *Act of Aug. 29, 1916 (39 Stat. 626), making appropriations for the support of the Army.*

1750. Quarters allowed to officers temporarily in the field.— * * * *Provided*, That hereafter officers temporarily absent on duty in the field shall not lose their right to quarters or commutation thereof at their permanent station while so temporarily absent. *Act of Feb. 27, 1893 (27 Stat. 480), making appropriations for the support of the Army.*

1751. Quarters for dependents of officers in the field or abroad during the World War.—That during the present emergency every commissioned officer of the Army of the United States on duty in the field, or on active duty without the territorial jurisdiction of the United States, who maintains a place of abode for a wife, child, or dependent parent, shall be furnished at the place where he maintains such place of abode, without regard to personal quarters furnished him elsewhere, the number of rooms prescribed by the Act of March second, nineteen hundred and seven (Thirty-fourth Statutes, page eleven hundred and sixty-nine), to be occupied by, and only so long as occupied by, said wife, child, or dependent parent; and in case such quarters are not available every such commissioned officer shall be paid commutation thereof and commutation for heat and light at the rate authorized by law in cases where public quarters are not available; but nothing in this Act shall be so construed as to reduce the allowances now authorized by law for any person in the Army. *Act of Apr. 16, 1918 (40 Stat. 530).*

That the rights and benefits prescribed under the Act of April 16, 1918, granting commutation of quarters, heat, and light during the present emergency to officers of the Army on duty in the field are hereby continued and made effective until June 30, 1922, and shall apply equally to officers of the Navy, Marine Corps, Coast Guard, and Public Health Service: *Provided*, That such rights and benefits as are prescribed for officers shall apply equally for enlisted men now entitled by regulations to quarters or to commutation therefor. *Sec. 2, act of May 18, 1920 (41 Stat. 602).*

The act of Mar. 2, 1907, mentioned above is set forth in 1748, ante, and 1753, post.

1752. Quarters for officers in the Canal Zone.—Hereafter officers of the Army pertaining to the United States troops serving in the Canal Zone shall not be required to pay rent for the occupancy of houses of the Panama Canal to which they may be assigned. *Act of July 9, 1918 (40 Stat. 855), making appropriations for the support of the Army.*

1753. Commutation of quarters.— * * * *Provided further*, That at places where there are no public quarters commutation therefor may be paid by the Pay Department to the officer entitled to the same at a rate not exceeding twelve dollars per month per room: * * * *Sec. 9, act of June 17, 1878 (20 Stat. 151), as amended by act of March 2, 1907 (34 Stat. 1169), making appropriations for the support of the Army.*

Provided, That hereafter, at places where there are no public quarters available, commutation for the authorized allowance therefor shall be paid to commissioned officers, acting dental surgeons, veterinarians, members of the Nurse

Corps, and pay clerks at the rate of \$12 per room per month; and, when specifically authorized by the Secretary of War, to enlisted men at the rate of \$15 per month, or in lieu thereof he may, in his discretion, rent quarters for the use of said enlisted men when so on duty. *Act of March 4, 1915 (38 Stat. 1069), making appropriations for the support of the Army.*

A provision of act of June 23, 1879 (21 Stat. 31), that the rate of commutation for officers' quarters should be \$12 per room, in lieu of \$10, was superseded by the amendment of this section. See also note to 1748, ante.

Notes of Decisions.

See also 1777, post, and notes thereunder.

Commutation for quarters.—Commutation can not be paid unless authorized by statute or regulation; i. e., the right to commutation does not arise automatically. *Smith v. U. S.* (1912), 47 Ct. Cl. 313.

Under Army Regulations.—Under section 1480 of the Army Regulations, which provides that "officers on duty, without troops, at stations where there are no public quarters, are entitled to commutation therefor," any suitable quarters provided by the Government for the use of an officer answer the requirement for "public quarters," though not expressly built for Army officers; and an officer assigned to duty as an Indian agent, and furnished a suitable building on the reservation for his quarters, without charge, is not entitled to receive commutation for quarters. *U. S. v. Dempsey* (C. C. 1900), 104 Fed. 197.

Places having no public quarters.—A military post or station, where there were public quarters for officers, but such quarters were insufficient for the accommodation of all the officers there, was held, in regard to those officers who were necessarily excluded from the public quarters, a place where there are no "public quarters" within the meaning of this section, and it was held that commutation for quarters might be allowed to officers thus excluded, in (1878) 16 Op. Atty. Gen. 611.

The word "places," in this section, relating to commutation for quarters at places where there are no public quarters, comprehends only military posts and stations. (1881) 17 Op. Atty. Gen. 169.

Demand for assignment of quarters.—Where the headquarters of a military department are in a large city, in which there are no quarters assignable to officers on duty, it is not necessary for an officer ordered there to make a demand that quarters be assigned to him. He will be entitled to recover commutation if it appear that there were no quarters which might have been assigned. *Lippitt v. U. S.* (1878), 14 Ct. Cl. 148; affirmed (1879), 100 U. S. 663.

Officers on leave of absence.—An officer in the enjoyment of quarters in kind at the commencement of leave of absence, taken under sec. 1662, ante, does not become entitled to commutation upon the commencement of the leave. (1879) 16 Op. Atty. Gen. 619; (1881) 17 Op. Atty. Gen. 41.

Nor does he become entitled to commutation if, during such leave, he voluntarily abandons the use of the quarters in kind, nor if he vacates his quarters in kind at the command of his superior, nor if there are unoccupied quarters at the post or station that might properly have been assigned to him had no leave been granted. (1881) 17 Op. Atty. Gen. 41. But see (1880) 16 Op. Atty. Gen. 577, wherein it was advised that where an officer of the Army, to whom leave of absence "without deduction of pay or allowance" had been granted, was at the time he took his leave entitled to an allowance of commutation for quarters under this section, such allowance was, by force of said sec. 1662, ante, continued to him while he was absent on leave for a period not exceeding that for which the leave was granted thereunder. (1880) 16 Op. Atty. Gen. 577.

Officers on waiting orders.—Where a military officer is ordered to the headquarters of a department to await further orders, and pursuant to the order remains there for a long period, performing no duty, he is nevertheless entitled to quarters or commutation of quarters. *Lippitt v. U. S.* (1878), 14 Ct. Cl. 148; *U. S. v. Lippitt* (1879), 100 U. S. 663, 669, 25 L. Ed. 747; contra, see (1881) 17 Op. Atty. Gen. 169. And see *Crosby v. U. S.* (1877), 13 Ct. Cl. 110, holding that an officer of the Army "unassigned" and "awaiting orders" at headquarters, who made no application for fuel and quarters, and did not show at the trial that no quarters were to be had at headquarters, was not entitled to commutation therefor, but, upon showing that there were no quarters at headquarters, he was entitled to commutation. *Crosby v. U. S.* (1877), 13 Ct. Cl. 110.

Officers detailed for duty.—Commutation of quarters is allowable only where an officer is detailed for duty without troops. *Moses v. U. S.* (1905), 41 Ct. Cl. 27. Hence an officer on duty with troops, though in a city where there are no quarters which can be assigned to him, is not entitled to commutation. *Hunt v. U. S.* (1903), 38 Ct. Cl. 704.

Officers detailed to college duties.—An officer detailed at his own request to act as professor of military science and tactics in a college is not entitled to commutation for quarters or mileage. *Spencer v. U. S.* (1906), 41 Ct. Cl. 430.

Officers awaiting trial.—An officer, ordered to report for trial at a place where quarters can not be assigned to him, is entitled to commutation for quarters during his trial, and while awaiting orders after the trial. *Walsh v. U. S.* (1908), 43 Ct. Cl. 225.

Contract surgeons.—A contract surgeon, on duty at the Washington Arsenal, held entitled to the commutation for quarters allowed by law to an assistant surgeon of the rank of first lieutenant, if no public quarters were available for his accommodation. (1882), 17 Op. Atty. Gen. 461.

Enlisted men.—Commissioned officers are entitled to commutation by virtue of the

Army Regulations, but there is no such provision for enlisted men. *Smith v. U. S.* (1912), 47 Ct. Cl. 313.

Servants.—Where commutation for quarters was allowable to Army officers under this section, it was held that it might include commutation for quarters for their servants, agreeably to the existing Army Regulations. (1879) 16 Op. Atty. Gen. 619. But see 1760, post.

Recovery of commutation paid.—Where an Army paymaster has paid an officer a sum as a commutation allowance through an error of law, the United States is not bound by such payment, and may recover the money so paid in a proper action, with interest from the date when the officer's accounts were settled by the Treasury Department, at the rate established by the laws of the State in which the action is brought. *U. S. v. Dempsey* (C. C. 1900), 104 Fed. 197.

Taxation as part of income.—Commutation for quarters paid to officers of the United States Army held to be parts of the incomes of such officers, and to be added to the other income in order to ascertain the total income taxable under the income tax law of 1894. (1895) 21 Op. Atty. Gen. 112.

1754. Commutation of quarters, heat and light to reservists and retired enlisted men on active duty.—For commutation of quarters and heat and light to commissioned officers, warrant officers, members of the Nurse Corps, and enlisted men on duty at places where no public quarters are available, including enlisted men of the Regular Army Reserves and retired enlisted men when ordered to active duty, \$6,131,550. *Act of June 5, 1920* (41 Stat. 956), *making appropriations for the support of the Army: Pay and so forth of the Army.*

The Regular Army Reserve was abolished, by 2198, post.

1755. Vacant.

1756. Military attachés, etc., entitled to commutation of quarters, mileage, and transportation.— * * * and hereafter the officers detailed to obtain the same shall be entitled to mileage and transportation, and also commutation of quarters while on this duty, as provided when on other duty. *Act of Feb. 27, 1893* (27 Stat. 480), *making appropriations for the support of the Army.*

This provision is for officers detailed to collect military information from abroad.

1757. Vacant.

1758. Commutation of quarters to officers and men of the Signal Service.— * * * *Provided*, That the allowance for commutation of quarters * * * shall be, * * * for officers and enlisted men of the Signal Service serving in the Arctic regions, the same in amount as though they were serving in Washington, District of Columbia: * * * *Act of June 30, 1882* (22 Stat. 118), *making appropriations for the support of the Army.*

1759. Determination as to availability of public quarters.—*Provided further*, That hereafter the Secretary of War may determine where and when there are

no public quarters available within the meaning of this or any other act. *Act of March 4, 1915 (38 Stat. 1069), making appropriations for the support of the Army.*

See 1753, ante, and notes thereunder.

1760. No claim for quarters for servants.— * * * *Provided, That no allowance shall be made for claims for quarters for servants heretofore or hereafter; * * * Act of June 23, 1879 (21 Stat. 31), making appropriations for the support of the Army.*

1761. Heat and light for authorized quarters.— * * * *Provided, That hereafter the heat and light actually necessary for the authorized allowance of quarters for officers and enlisted men shall be furnished at the expense of the United States under such regulations as the Secretary of War may prescribe: * * * Act of Mar. 2, 1907 (34 Stat. 1167), making appropriations for the support of the Army.*

See 249, ante.

By a proviso annexed to the appropriation for barracks and quarters in the recent Army appropriation acts, no part of the moneys so appropriated is to be paid for commutation of fuel or for quarters to officers or enlisted men.

1762. Mounts and horse equipments of mounted officers.— * * * That hereafter the United States shall furnish mounts and horse equipments for all officers of the Army below the grade of major required to be mounted, but in case any officer below the grade of major required to be mounted provides himself with suitable mounts at his own expense, he shall receive an addition to his pay of one hundred and fifty dollars per annum if he provides one mount, and two hundred dollars per annum if he provides two mounts. * * * *Act of May 11, 1908 (35 Stat. 108), making appropriations for the support of the Army.*

A previous provision that officers assigned to duty which required them to be mounted should receive the pay, etc., of Cavalry officers of the same grade, added to R. S. 1270, by amendment by act of Feb. 27, 1877 (19 Stat. 243), may be regarded as superseded by this provision.

Notes of Decisions.

Mounted pay.—A mounted officer is one who, by statute, regulation, or Army organization, is required to be mounted at his own expense. In re Harrold (1888), 23 Ct. Cl. 205. Mounted pay is not synonymous with mounted service. Cross-

ley v. U. S. (1903), 38 Ct. Cl. 82. It is not an allowance, but pay proper. The officer receives it, whether he is actually mounted or not. Richardson v. U. S. (1903), 38 Ct. Cl. 182.

1763. Mounts for signal details.—Enlisted men detailed for signal duty shall when it is deemed necessary, be mounted on horses provided by the Government. *R. S. 1197.*

The enlisted men mentioned in this section were those detailed from the battalion of Engineers for signal duty under R. S. 1196. The provision may be regarded as applicable to enlisted men of the Signal Corps as constituted under later statutes.

1764. Forage allowance.— * * * and forage in kind may be furnished to the officers of the Army, of the Quartermaster's Department, only for horses owned and actually kept by such officers in the performance of their official military duties when on duty with troops in the field or at such military posts west of the Mississippi River, as may be from time to time designated by the Secretary of War, and not otherwise as follows: To the General, five horses; to the Lieutenant-General, four horses; to a major-general, three horses; to a brigadier-general, three horses; to a colonel, two horses; to a lieutenant-colonel,

two horses; to a major, two horses; to a captain (mounted), two horses; to a lieutenant (mounted), two horses; to an adjutant, two horses; to a regimental quartermaster, two horses. *Sec. 8, act of June 18, 1878 (20 Stat. 150)*, making appropriations for the support of the Army.

The portion of the section omitted here provided for furnishing fuel to officers at specified prices. It was superseded by a subsequent provision of the same nature of act of June 12, 1906, ante §49.

A subsequent provision that heat and light for quarters for officers and enlisted men shall be furnished at the expense of the United States, made by act of Mar. 2, 1907, is set forth, 1761, ante.

This section and the act of Feb. 24, 1881 (21 Stat. 347), have been regarded as repealing R. S. 1271, 1272, and imposing the additional requirement that the horses shall not only be "actually kept," but also "owned" by officers in the performance of their military duties. In a decision dated Jan. 23, 1913 (19 Comp. Dec., 460), the Comptroller held that these acts did not entirely repeal R. S. 1271, 1272, but merely imposed the added condition upon officers of the Army serving in this country, which is that they shall not only keep their horses in the military service in the performance of their official military duties but that they shall actually own them as well; and that "the issue of forage to military attaches abroad is governed by section 1272 of the Revised Statutes, under which such officers are only required to actually keep their horses in the service when on duty, and at the place where they are on duty, to be entitled to draw the authorized allowance of forage for them."

See notes to 1766, post.

1765. Forage allowance east of the Mississippi River.— * * * *Provided*, That there shall be no discrimination in the issue of forage against officers serving east of the Mississippi River, provided they are required by law to be mounted, and actually keep and own their animals. *Act of June 30, 1882 (22 Stat. 119)*, making appropriations for the support of the Army.

1766. Commutation of forage.—Fuel, quarters, and forage may be furnished in kind to officers by the Quartermaster's Department according to law and regulations. *R. S. 1270*.

Provided, however, That when forage in kind can not be furnished by the proper departments, then and in all such cases officers entitled to forage may commute the same according to existing regulations: * * * *Act of Feb. 27, 1877 (19 Stat. 243)*, amending *R. S. 1270*.

This section, as enacted in the Revised Statutes, contained only the provision at the beginning thereof as set forth here, for furnishing fuel, quarters, and forage in kind to officers. It was amended by sec. 1, act of Feb. 27, 1877 (19 Stat. 243), by adding thereto the proviso for commutation of forage set forth here.

The provision for furnishing fuel to officers, made by the word "fuel," in this section, was superseded by the provision prohibiting such allowance of or commutation for fuel, made by sec. 8, act of June 18, 1878, and by further provisions relating to the subject, 949 and 1701, ante.

Notes of Decisions.

Fuel and quarters.—Decisions under prior laws and the various Army Regulations, see Mileage and Commutation Cases (1876), 94 U. S. 210, 223, 24 L. Ed. 116; (1829) 2 Op. Atty. Gen. 223; (1835) 2 Op. Atty. Gen. 702; (1859) 9 Op. Atty. Gen. 376.

Under act of July 15, 1870 (16 Stat. 320), which constituted this section, prior to its amendment by act of Feb. 27, 1877 (19 Stat. 243), the allowance to officers in the Army of fuel and quarters in kind for their servants was held still authorized to be made. (1871) 13 Op.

Atty. Gen. 417.

Forage.—Forage to officers, see *Forbes v. U. S.* (1881), 17 Ct. Cl. 132; *Carter v. U. S.* (1887), 22 Ct. Cl. 73; *Stevens v. U. S.* (1908), 43 Ct. Cl. 484; *McLean v. U. S.* (1912), 33 Sup. Ct. 122, 226 U. S. 374, 57 L. Ed. 260, reversing judgment (1910), 45 Ct. Cl. 95; (1838), 3 Op. Atty. Gen. 340; (1845), 4 Op. Atty. Gen. 415; (1848), 5 Op. Atty. Gen. 1; (1851), 5 Op. Atty. Gen. 406; (1864), 11 Op. Atty. Gen. 70; (1882), 17 Op. Atty. Gen. 390.

To soldiers.—See *Valdes v. U. S.* (1880), 16 Ct. Cl. 550.

1767. Care of officers' mounts.— * * * and nothing in the Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year nineteen hundred and eight, or any other Act, shall hereafter be held or construed so as to deprive officers of the Army, wherever on duty in the military service of the United States, of forage, bedding, shoeing, or shelter for their authorized number of horses, or of any means of transportation or maintenance therefor for which provision is made by the terms of this Act; * * * *Act of Mar. 2, 1907 (34 Stat. 1166), making appropriations for the support of the Army.*

The portions of the legislative, executive, and judicial appropriation acts which appear to have been contemplated in these provisions of the Army appropriation acts were the sections restricting the use of any money appropriated by those or any other acts for expenses of horses, carriages, and drivers, or for purchasing, maintaining, etc., carriages or vehicles, for the use of officers; sec. 3, act of Mar. 18, 1904 (33 Stat. 142), and sec. 4, act of Feb. 3, 1905, ante, 1280.

1768. Care of an officer's mounts during his absence.— * * * and hereafter, when an officer is separated from his authorized number of owned horses through the nature of the military service upon which employed, they shall not be deprived of forage, bedding, shelter, shoeing, or medicines therefor, because of such separation; * * * *Act of Mar. 23, 1910 (36 Stat. 252), making appropriations for the support of the Army.*

1769. Care of mounts of officers on duty overseas or in Alaska.— * * * *And provided further,* That hereafter, under such regulations as the Secretary of War may direct, the authorized horses of mounted officers ordered for duty over the seas or to Alaska may be transported at public expense to remount depots or elsewhere in the United States for safekeeping during the absence of such officers; * * * *Act of July 9, 1918 (40 Stat. 859), making appropriations for the support of the Army.*

1770. Transportation of an officer's mount from the point of purchase to the officer's station.— * * * and hereafter transportation may be furnished for the owned horses of an officer, not exceeding the number authorized by law, from point of purchase to his station, when he would have been entitled to and did not have his authorized number of owned horses shipped upon his last change of station, and when the cost of shipment does not exceed that from his old to his new station; * * * *Act of Mar. 23, 1910 (36 Stat. 255), making appropriations for the support of the Army.*

1771. Transportation of officers' private mounts.— * * * *Provided further,* That hereafter private mounts of officers in excess of the authorized mounts may be shipped on Government bill of lading with authorized mounts, and reimbursement collected for transportation charges on such excess mounts; * * * *Act of Apr. 27, 1914 (38 Stat. 365), making appropriations for the support of the Army.*

Notes of Decisions.

Transportation of private mounts.—In the absence of any statute authorizing payment for the transportation of mounts, the private property of officers of the Army, the Secre-

tary of War can not, by the promulgation of a regulation, bind the Government to the payment of such transportation. *I. C. R. R. Co. v. U. S. (1917), 52 Ct. Cl. 58.*

1772. Transportation of mounts of deceased officers.—That hereafter, under such regulations as the Secretary of War may prescribe, authorized mounts of officers who die in the service may, within ninety days after the death of the officer, be transported at public expense from their last duty station to

such places within the limits of the United States as may be the home of their families, or as may be designated by their legal representatives or executors, or such mount may be disposed of as directed by such representatives or executors. *Chap. XVIII, act of July 9, 1918 (40 Stat. 892), making appropriations for the support of the Army.*

1773. Expenses of attendance at horse shows, etc.— * * * *And provided further,* That hereafter no part of this or any other appropriation shall be expended for defraying expenses of officers, enlisted men, or horses in attending or taking part in horse shows or horse races; but nothing in this proviso shall be held to apply to the officers, enlisted men, and horses of any troop, battery, or company which shall, by order or permission of the Secretary of War, and within the limits of the United States, attend any horse show or any State, county, or municipal fair, celebration, or exhibition. *Act of April 27, 1914 (38 Stat. 363), making appropriations for the support of the Army, Horses for cavalry, Artillery, Engineers, and so forth.*

1774. Transportation of Army baggage and supplies.—For transportation of the Army and its supplies, including transportation of the troops when moving either by land or water, and of their baggage, including the warrant officers of the Mine Planter Service, members of the Officers' Reserve Corps, enlisted men of the Enlisted Reserve Corps, and retired enlisted men when ordered to active duty, including the cost of packing and crating; * * * *Act of June 5, 1920 (41 Stat. 959), making appropriations for the support of the Army: Transportation.*

Similar provisions appear in previous appropriation acts.

Notes of Decisions.

Reduced rates for officers' baggage.—Reduced rates may be granted by a carrier for the transportation of the personal effects of Army officers changing station under orders, in view of the provision of sec. 22 of the Interstate commerce act of Feb. 4, 1887 (24 Stat. 387), permitting reduced rates to the

United States, and of a conference ruling of the Interstate Commerce Commission, making such section applicable to property transported for the United States. *Western Pac. R. Co. v. U. S. (Sup. Ct. U. S. 1921), 65 L. Ed. 430.*

See also notes to 1238, ante.

1775. Transportation of baggage in excess of allowance.— * * * *Provided* That hereafter baggage in excess of regulation change of station allowances may be shipped with such allowances, and reimbursement collected for transportation charges on such excess; * * * *Act of Mar. 23, 1910 (36 Stat. 255), making appropriations for the support of the Army.*

1776. Transportation of baggage of discharged enlisted men.— * * * *Provided,* That hereafter when an enlisted man having ten or more years' service in the Army is discharged on account of disability incurred in the line of duty, transportation of his authorized change of station allowance of baggage from his last duty station to his home in addition to other travel allowances fixed by law may be authorized by the Secretary of War: * * * *Act of Aug. 29, 1916 (39 Stat. 633), making appropriations for the support of the Army.*

1777. Determination of travel and duty without troops.— * * * The Secretary of War may determine what shall constitute travel and duty without troops within the meaning of the laws governing the payment of mileage and commutation of quarters to officers of the Army: * * * *Act of June 12, 1906 (34 Stat. 246), making appropriations for the support of the Army.*

Previous provisions relating to the same subject, and similar to some extent, made by act of Mar. 2, 1901 (31 Stat. 901), may be regarded as superseded by this provision.

Notes of Decisions.

Travel and duty without troops.—The provision in this section, authorizing the Secretary of War to determine what constitutes travel and duty without troops, was declaratory, and did not change the existing law. *Anderson v. U. S.* (1904), 39 Ct. Cl. 316.

Officer following regiment.—A sick officer, left at his post and subsequently ordered to follow his regiment, may recover mileage, less the cost of transportation furnished. *Sutherland v. U. S.* (1906), 41 Ct. Cl. 209.

Change of station.—An officer ordered at the expiration of his leave of absence to a new station for temporary service is entitled to mileage from his home to the station; but he is not entitled to mileage for travel from the station to his regi-

ment, if the distance be less than from his home there. *Foster v. U. S.* (1908), 43 Ct. Cl. 170.

An officer ordered from his post, at which he is doing duty, to his home to await orders does not change his station. *McGowan v. U. S.* (1913), 48 Ct. Cl. 95.

Transportation furnished.—Acceptance of transportation furnished deprives one from claiming mileage. *Thomas v. U. S.* (1903), 38 Ct. Cl. 70. See, also, *Reichherzer v. U. S.* (1908), 43 Ct. Cl. 340.

Taxation of mileage allowance.—Under the income-tax law of 1894, mileage paid to officers of the United States Army was to be considered as part of the incomes of such officers and to be added to other income in order to ascertain the total income. (1895) 21 Op. Atty. Gen. 112.

1778. Transportation in kind furnished to officers without troops.— * * * *Provided further*, That officers who so desire may, upon application to the Quartermaster's Department, be furnished under their orders transportation requests for the entire journey by land, exclusive of sleeping and parlor car accommodations, or by water; and the transportation so furnished shall, if travel was performed under a mileage status, be a charge against the officer's mileage account, to be deducted at the rate of three cents per mile by the paymaster paying the account, and of the amount so deducted there shall be turned over to an authorized officer of the Quartermaster's Department three cents per mile for transportation furnished, except over any railroad which is a free or fifty per centum land-grant railroad, for the credit of the appropriation for the transportation of the Army and its supplies: * * * *Act of June 19, 1906 (34 Stat. 246), making appropriations for the support of the Army: Transportation of the Army and its supplies.*

1779. Transportation of dependents.—That hereafter when any commissioned officer, noncommissioned officer of the grade of color sergeant and above, including any noncommissioned officer of the Marine Corps of corresponding grade, warrant officer, chief petty officer, or petty officer (first class), having a wife or dependent child or children, is ordered to make a permanent change of station, the United States shall furnish transportation in kind from funds appropriated for the transportation of the Army, * * * to his new station for the wife and dependent child or children: * * * *Provided further*, That if the cost of such transportation exceeds that for transportation from the old to the new station the excess cost shall be paid to the United States by the officer concerned: *Provided further*, That transportation supplied the wife or dependent child or children of such officer, to or from stations beyond the continental limits of the United States, shall not be other than by Government transport, if such transportation is available:

* * * *Sec. 12, act of May 18, 1920 (41 Stat. 604).*

* * * The temporary allowance of rations authorized by section 5, and the transportation privileges authorized by section 12, of the said Act, shall apply only to enlisted men of the first three grades. *Sec. 4b, added to the act of June 3, 1916, added by sec. 4, act of June 4, 1920 (41 Stat. 761).*

1780. Mileage allowance of officers.— * * * *Provided*, That hereafter officers, active and retired, when travelling under competent orders without troops,

and retired officers who have so traveled since March third, nineteen hundred and five, shall be paid seven cents per mile and no more; distances to be computed and mileage to be paid over the shortest usually traveled routes, with deduction as hereinafter provided; and payment and settlement of mileage accounts of officers shall be made according to distances and deductions computed over routes established and by mileage tables prepared by the Paymaster-General of the Army under the direction of the Secretary of War. * * * *Act of June 12, 1906 (34 Stat. 246), making appropriations for the support of the Army.*

R. S. 1273, fixed the allowance of mileage at 10 cents per mile, to be computed over the nearest post route and to be paid by the Pay Department. The act of June 16, 1874 (18 Stat. 72), discontinued mileage as a method or reimbursement for expenses incurred in traveling on duty, and substituted therefor the payment of actual expenses in all cases of travel under orders. This provision was repeated in the act of Mar. 3, 1875 (18 Stat. 452). The mileage allowance was restored and fixed at the rate of 8 cents per mile by the act of July 24, 1876 (19 Stat. 100), but was not payable when actual transportation had been furnished by the Quartermaster's Department, or in a conveyance owned or chartered by the United States, or on any railroad over which the troops and supplies of the United States were entitled to be transported free of charge; the distance in each case was to be computed by the shortest usually traveled route. R. S. 1273 was repealed by the act of July 24, 1876, above cited. The act of Mar. 3, 1883 (22 Stat. 456), contained the requirement that mileage should be computed over the shortest usually traveled routes between the points named in the order and that the necessity for travel should be certified to, in each case, in the order directing the journey. The act of June 30, 1886 (24 Stat. 95), fixed the rate of mileage at 4 cents per mile, and, in addition thereto, the cost of transportation actually paid, exclusive of sleeping and parlor car fares. The act of Feb. 9, 1887 (24 Stat. 396), contains the following provision: "That in disbursing this amount the maximum sum to be allowed and paid to an officer shall be 4 cents per mile, distance to be computed over the shortest usually traveled routes, and, in addition thereto, upon the officer's certificate that it was not practicable to obtain transportation from the Quartermaster's Department the cost of the transportation actually paid by the officer over said route or routes, exclusive of sleeping or parlor car fare and transfers: *And provided further*, That when any officer so traveling shall travel in whole or in part on any railroads on which the troops and supplies of the United States are entitled to be transported free of charge he shall be allowed for himself only 4 cents per mile as a subsistence fund for every mile necessarily traveled over any such last-named railroad. All the money heretofore appropriated except the appropriation for mileage to officers when traveling on duty without troops when authorized by law shall be disbursed and accounted for by the Pay Department as pay of the Army, and for that purpose shall constitute one fund," which was repeated in the acts of Sept. 22, 1888 (25 Stat. 483), Mar. 2, 1889 (25 Stat. 827), June 18, 1890 (26 Stat. 151), Feb. 24, 1891 (26 Stat. 773), July 14, 1892 (27 Stat. 177), and Feb. 27, 1893. The acts of Feb. 12, 1895 (28 Stat. 657), and Mar. 16, 1896 (29 id., 60), contain the same requirements. The act of Mar. 2, 1897 (29 id., 612, 614), provided that actual transportation should be furnished by the Quartermaster's Department to officers traveling under orders, and that mileage only should be paid by the Pay Department. The act of Mar. 15, 1898 (30 Stat. 318), contained the requirement that "the maximum sum to be allowed and paid to any officer of the Army shall be 7 cents per mile, distances to be computed by the shortest usually traveled route." By the act of Mar. 3, 1899 (30 Stat. 1068), the foregoing requirement was made permanent. The act of Mar. 15, 1898, also contained the proviso that "officers who, by reason of the decision of the accounting officers of the Treasury, have been compelled to pay from their own means one-half of the cost of their travel fare over railroads known as fifty per centum railroads shall be reimbursed the same by the Pay Department, and paymasters against whom disallowances have been made by the accounting officers of the Treasury, under such decision, shall have the amount so disallowed passed to their credit."

1781. Certificate of necessity for travel.— * * * and from and after the passage of this act mileage of officers of the Army shall be computed over the shortest usually traveled routes between the points named in the order, and the necessity for such travel in the military service shall be certified to by the

officer issuing the order and stated in said order. * * * *Act of Mar. 3, 1883 (22 Stat. 456), making appropriations for the support of the Army.*

1782. Travel order must specify duty.— * * * and all orders involving the payment of mileage shall state the special duty enjoined. *Act of Aug. 6, 1894 (28 Stat. 237), making appropriations for the support of the Army.*

1783. Travel by officers over bond-aided roads.— * * * *And provided further,* That when the established route of travel shall, in whole or in part, be over the line of any railroad on which the troops and supplies of the United States are entitled to be transported free of charge, or over any fifty per centum land-grant railroad, officers traveling as herein provided for shall, for the travel over such roads, be furnished with transportation requests, exclusive of sleeping and parlor car accommodations, by the Quartermaster's Department: *And provided further,* That when transportation is furnished by the Quartermaster's Department, or when the established route of travel is over any of the railroads above specified, there shall be deducted from the officer's mileage account by the paymaster paying the same three cents per mile for the distance for which transportation has been or should have been furnished: * * * *Act of June 12, 1906 (34 Stat. 246), making appropriations for the support of the Army.*

1784. Mileage of officers of the Corps of Engineers.—That in determining the mileage of officers of the corps of engineers traveling without troops on duty connected with works under their charge, no deduction shall be made for such travel as may be necessary on free or bond-aided or land-grant railways. *Sec. 15. act of Sept. 19, 1890 (26 Stat. 456).*

1785. Mileage of graduated cadets from their homes to their first stations.— * * * *Provided further,* That hereafter a graduate of the Military Academy shall receive mileage as authorized by law for officers of the Army from his home to the station which he first joins for duty; *Act of Aug. 9, 1912 (37 Stat. 252).*

1786. Mileage where the station of an officer is changed while on leave of absence.— * * * *And provided further,* That when the station of an officer is changed while he is on leave of absence he will on joining the new station be entitled to mileage for the distance to the new station from the place where he received the order directing the change, provided the distance be no greater than from the old to the new station; but if the distance be greater he will be entitled to mileage for a distance equal to that from the old to the new station only: * * * *Act of June 12, 1906 (34 Stat. 247), making appropriations for the support of the Army.*

1787. Travel of officers on inspections and investigations.— * * * And hereafter no portion of the appropriation for mileage to officers traveling on duty without troops shall be expended for inspections or investigations, except such as are especially ordered by the Secretary of War, or such as are made by army and department commanders in visiting their commands, and those made by Inspector-General's Department in pursuance of law, army regulations or orders issued by the Secretary of War or the Commanding General of the Army; * * * *Act of Aug. 6, 1894 (28 Stat. 237), making appropriations for the support of the Army.*

Notes of Decisions.

Mileage.—Mileage is a form of reimbursement, and "public business" is the foundation on which it rests. *Perrimond v. U. S., 19 Ct. Cls. 609.*

Allowances for travel and subsistence are payable to officers and agents of the United States only when they are employed at other places than their places of residence. *Test v. U. S.*, id. 357.

In fact, mileage is merely a commutation for travelling expenses. *U. S. v. Smith*, 158 U. S., 350.

It is not necessary that an order to travel should specifically designate places and routes. It may leave them to the discretion of the officer, and the subsequent approval of the department will be conclusive upon the accounting officers. *Billings v. U. S.*, 23 Ct. Cls. 166.

If public business was an element in an officer's circuitry of route, he is entitled to mileage therefor; if it was not, the Government is not answerable for the increased distance. *Du Bose v. U. S.*, 19 Ct. Cls. 514.

Where the route is left to the discretion of the officer, his mileage should be calculated by the shortest usually traveled route, unless some good reason be shown for deviation. *Crosby v. U. S.*, 22 Ct. Cls. 13. 2 Comp. Dec. 544.

An officer ordered home, at his own request, to await orders, is entitled to mile-

age from his post to his home, such a journey constituting travel under orders. *Williamson v. U. S.*, 23 Wall. 411; *Phila-terer v. U. S.*, 12 Ct. Cls. 98, and 94 U. S., 219.

Where an officer who has received but has not yet taken advantage of a leave of absence is ordered to convey prisoners to another post his leave is to that extent suspended, and he is entitled to mileage. *Andrews v. U. S.*, 15 Ct. Cls. 264.

The Army Regulations provide that the expiration of an officer's leave of absence must find him at his station. His station means his permanent station, not a place to which he was temporarily ordered and at which he accepted his leave of absence. *Andrews v. U. S.*, 15 Ct. Cls. 264.

An officer's proper station can not be changed by his being ordered to perform a temporary duty while on leave of absence. (Id.)

If an officer on leave of absence be ordered to temporary duty at the place where he may happen to be, and he be kept there until after his leave of absence expires and then be ordered to his proper station, he will not be entitled to mileage. *Barr v. U. S.*, 14 Ct. Cls. 272.

1788. Travel of officers of the Corps of Engineers.—In their execution and inspection of river and harbor improvement work, at points beyond easy reach of ordinary regular transportation lines, Engineer officers are authorized to hire and use such transportation as they may consider desirable and advantageous to the progress of work. *Sec. 9, act of July 25, 1912 (37 Stat. 293), making appropriations for works on rivers and harbors.*

1789. Travel of inspectors and instructors of the National Guard.—For travel of Federal officers and noncommissioned officers making inspections, \$30 462.

For travel of Federal officers and noncommissioned officers changing stations, \$6.002.

For travel of Federal officers and noncommissioned officers on visits of instruction, \$30.462.

For travel of Federal officers and noncommissioned officers connected with camps of instruction, \$46.013. *Act of June 5, 1920 (41 Stat. 972), making appropriations for the support of the Army: National Guard.*

Similar appropriations have been made in previous appropriation acts.

1790. Journeys of officers for instruction.— * * * for travel expenses of officers on journeys approved by the Secretary of War and made for the purpose of instruction, * * * *Provided*, That the traveling expenses herein provided for shall be in lieu of mileage and other allowances; * * * *Act of June 5, 1920 (41 Stat. 969), making appropriations for the support of the Army: Engineer School.*

Similar provision appears in previous appropriation acts.

1791. Travel by chaplains.— * * * When serving in the field, chaplains shall be furnished with necessary means of transportation by the Quartermaster's Department. *Sec. 12, act of Feb. 2, 1901 (31 Stat. 750).*

1792. Travel of officers detailed with the Bureau of Lighthouses.—That hereafter officers of the Army and Navy detailed for service in connection with the Light-House Establishment shall be paid their actual traveling expenses when traveling under orders on official duty to and from points which can not be conveniently reached by vessel or railroad. *Sec. 6, act of Feb. 26, 1907 (31 Stat. 997).*

This section was part of an act to authorize additional aids to navigation in the Lighthouse Establishment.

Other sections of said act, being temporary merely in their nature, are omitted.

A general limitation on subsistence allowances, or money in lieu thereof, was made by 79, ante.

1793. Travel on Ordnance duty.—*Provided further*, That mileage to officers of the Ordnance Department traveling on duty in connection with that department shall be paid from the appropriation for the work in connection with which the travel is performed. *Act of May 12, 1917 (40 Stat. 65).*

1794. Travel by officers in connection with aviation.—That hereafter mileage to officers of the Army traveling on duty in connection with aviation shall be paid from the appropriation for the work in connection with which the travel is performed. *Act of July 9, 1918 (40 Stat. 840).*

A similar provision appeared in act of May 12, 1917 (4 Stat. 43).

1795. Travel by air.— * * * *Provided further*, That hereafter actual and necessary expenses only, not to exceed \$8 per day, shall be paid to officers of the Army and contract surgeons when traveling by air on duty without troops, under competent orders: * * * *Act of July 11, 1919 (41 Stat. 109).*

1796. Travel allowances of discharged officers.— * * * *Provided also*, That hereafter when an officer shall be discharged from the service, except by way of punishment for an offense, he shall receive for travel allowances from the place of his discharge to the place of his residence at the time of his appointment or to the place of his original muster into the service four cents per mile; *Provided further*, That any officer or enlisted man in the service of the United States who was discharged in the Philippine Islands and there reentered the service through commission or enlistment shall, when discharged, except by way of punishment for an offense, receive for travel allowances from the place of his discharge to the place in the United States of his last preceding appointment or enlistment, or to his home if he was appointed or enlisted at a place other than his home, four cents per mile: *Provided further*, That for sea travel on discharge actual expenses only shall be paid to officers * * *. *Act of March 2, 1901 (31 Stat. 903), making appropriations for the support of the Army.*

* * * for payment of travel pay to officers of the National Guard on their discharge from the service of the United States, as prescribed in the Act approved March 2, 1901; * * * *Act of June 5, 1920 (41 Stat. 959), making appropriations for the support of the Army: Transportation of the Army.*

The above provisions superseded those of R. S. 1289, 1290, for allowances to officers and to enlisted men, on discharge, of transportation and subsistence, or of travel pay and commutation of subsistence, and further provisions relating thereto of act of Mar. 16, 1896 (29 Stat. 63), act of June 7, 1900 (31 Stat. 708), and act of Feb. 8, 1901 (31 Stat. 762).

The provision as to discharged enlisted men has been superseded by post, 1802.

Similar provisions appear in previous appropriation acts.

Notes of Decisions.

Nature of travel allowance.—Traveling | against the contingency of a discharge expenses are of the nature of indemnity | at another place than that of enlistment.

Sherburne's Adm'r v. U. S. (1880), 16 Ct. Cl. 491; *Gulick v. U. S.* (1908), 43 Ct. Cl. 306; *Id.* (1909), 44 Ct. Cl. 532.

Construction of section in general.—The plain intent of the statute can not be controlled by the construction given to it by the accounting officers. *Barnett v. U. S.* (1901), 37 Ct. Cl. 49.

An officer provisionally appointed by the War Department, the appointment in terms subject to the action of an examining board, is not in military service, even though assigned to military duty, so as to entitle him to mileage when discharged on being rejected by the board. *Greer v. U. S.* (1867), 3 Ct. Cl. 182.

Change in law.—It is within the power of Congress to change the law allowing indemnity or commutation to officers on their discharge for traveling expenses; and an officer so paid has no legal or equitable claim for a larger amount than that allowed by the law at the time of his discharge. *Gulick v. U. S.* (1908), 43 Ct. Cl. 306.

Discharge from service.—Where at a time when an officer was discharged the Government furnished transportation to thousands of discharged soldiers over private lines, and money was not furnished to discharged officers or men, the burden of proof on the question of whether transportation was or was not furnished rests upon the plaintiff. *Hammond v. U. S.* (1914), 49 Ct. Cl. 217.

Satisfactory evidence should be furnished to remove the presumption that the Government, at the time of the discharge of officers or men from the military service, had complied with the law in the matter of furnishing transportation whensoever proper. *Id.*

Where an officer or a soldier is discharged at his own request, and for his own pleasure and convenience, the settled practice of the War Department and the Treasury Department is to deny the payment of travel pay and allowances. *Id.*; *Brodgen v. U. S.* (1908), 43 Ct. Cl. 566.

Discharge in Philippines.—The provision relating to soldiers discharged in the Philippine Islands held not to extend to a

soldier permitted to leave the service to enter business before the discharge of his regiment, or before its return to the United States, where the discharge was for his own benefit. *Brodgen v. U. S.* (1908) 43 Ct. Cl. 566.

An Army officer is not discharged from service by his retirement. *U. S. v. Gillmore* (C. C. 1911), 189 Fed. 761.

Resignation from service.—It is doubtful whether a volunteer officer, who resigns before the expiration of his term of enlistment, is entitled to transportation or mileage. *Price v. U. S.* (1868), 4 Ct. Cl. 164. And see *U. S. v. Sweet* (1903), 23 Sup. Ct. 638, 639, 189 U. S. 471, 47 L. Ed. 907, wherein it was held that the settled practice of the War Department to deny an officer discharged at his own request the travel pay and commutation of subsistence from the place of discharge to the place of reenlistment allowable under this section is not so clearly erroneous as to justify the courts in construing such provision as including a discharge on resignation. *U. S. v. Sweet* (1903), 23 Sup. Ct. 638, 639, 189 U. S. 471, 47 L. Ed. 907.

Reappointment to service.—This section does not extend to an officer who immediately reenters the service under a new appointment. *Hull v. U. S.* (1903), 38 Ct. Cl. 407.

Residence.—The residence of an officer may be the place where he became qualified to discharge the duties of his office. *Sells v. U. S.* (1901), 36 Ct. Cl. 94.

Transportation in kind.—A discharged officer, seeking to recover travel pay and allowances upon his discharge, must produce some evidence to remove the presumption that he was furnished with transportation in kind at the time of his discharge. *Sanderson v. U. S.* (1906), 41 Ct. Cl. 230.

Muster into service.—The phrase "or to the place of his original muster into the service," applies properly to officers of National Guard organizations. The words "muster in" are applicable only to bodies of men. *Emory v. United States*, 19 Ct. Cls. 254, 262.

1797. Travel by sea.— * * * *And provided further,* That for all sea travel actual expenses only shall be paid to officers, contract surgeons, contract dental surgeons, and veterinarians, to paymasters' clerks, and to the expert accountant of the Inspector-General's Department, when traveling on duty under competent orders, with or without troops, and the amount so paid shall not include any shore expenses at port of embarkation or debarkation; but for the purpose of determining allowances for all travel under orders, or for officers and enlisted men on discharge, travel in the Philippine Archipelago, the Hawaiian Archipelago, the home waters of the United States, and between the United States and Alaska shall not be regarded as sea travel and shall be paid for at the rates established

by law for land travel within the boundaries of the United States. *Act of June 12, 1906 (34 Stat. 247)*, making appropriations for the support of the Army.

A provision that actual expenses only be paid to paymasters' clerks and the expert accountant of the Inspector General's Department for sea travel, contained in act of June 30, 1902 (32 Stat. 511), was superseded by the more comprehensive provisions above.

1798. Transportation of recruits and recruiting parties.— * * * for transportation of recruits and recruiting parties, of applicants for enlistment between recruiting stations and recruiting depots; * * * *Act of June 5, 1920 (41 Stat. 959)*, making appropriations for the support of the Army.

1799. Enlisted men traveling under orders.—That hereafter under such regulations and within such maximum rates as may be prescribed by the Secretary of War enlisted men may be reimbursed for actual expenses of travel, including subsistence and lodging, incurred while traveling under competent orders and not embraced in the movement of troops, or they may be paid a flat per diem therefor in lieu of such reimbursement. *Act of Apr. 20, 1918 (40 Stat. 534)*.

1800. Furlough fares.—The Secretary of War and the Secretary of the Navy, under such regulations and restrictions as they may provide, are hereby authorized to issue to all wounded and otherwise disabled soldiers, sailors, or marines under treatment in any Army, Navy, or other hospital, who are given furloughs at any time, a furlough certificate, which certificate shall be signed by the commanding officer at such hospital. This furlough certificate when presented by such furloughed soldier, sailor, or marine to the agent of any railroad or steamship company over whose lines said soldier, sailor, or marine may travel to and from his home during the furlough period shall entitle said soldier, sailor, or marine to purchase a ticket from the point of departure to point of destination and return at the rate of 1 cent per mile, and on presentation of such certificate on which such ticket has been issued the railroad or steamship company issuing such ticket shall be entitled to receive from the Treasury of the United States the difference between the amount paid for such ticket at the rate of 1 cent per mile and the regular scheduled rate for such ticket. The sum of \$250,000, or so much thereof as may be necessary, is hereby appropriated, out of any funds in the Treasury not otherwise appropriated, for the purpose of carrying out the provisions of this paragraph. *Act of June 5, 1920 (41 Stat. 975-976)*, making appropriations for the support of the Army.

1801. Mileage for enlisted men relieved from duty.— * * * And provided further, That in the discretion of the Secretary of War, and under such regulations as he may prescribe, travel pay at the rate now prescribed by law for discharged soldiers may be given to all enlisted men for whom the law authorizes travel allowances as an incident to their entry upon and relief from active duty with the Army. *Act of July 9, 1918 (40 Stat. 860)*, making appropriations for the support of the Army.

That section 126 of the Act entitled "An Act for making further and more effectual provisions for the national defense, and for other purposes," approved June 3, 1916, as amended by section 3 of an Act entitled "An Act permitting any person who has served in the United States Army, Navy, or Marine Corps in the present war to retain his uniform and personal equipment, and to wear the same under certain conditions," approved February 28, 1919, shall be held to apply to any enlisted man for whom the law authorizes travel allowances as an incident to entry upon and relief from active duty with the Army who has been called into active service during the present

emergency, or who shall hereafter be called into active service. *Act of Sept. 29, 1919* (41 Stat. 288).

See notes under 1796, ante.

1802. Travel allowance of enlisted men on discharge.—That an enlisted man honorably discharged from the Army, Navy, or Marine Corps since November eleventh, nineteen hundred and eighteen, or who may hereafter be honorably discharged, shall receive five cents per mile from the place of his discharge to his actual bona fide home or residence, or original muster into the service, at his option: *Provided*, That for sea travel on discharge, transportation and subsistence only shall be furnished to enlisted men: * * * *Sec. 126, act of June 3, 1916* (39 Stat. 217), as amended by *sec. 3, act of Feb. 28, 1919* (40 Stat. 1203).

* * * for travel allowance to officers and enlisted men on discharge; for payment of travel allowance as provided in section 126 of the Act approved June 3, 1916, to enlisted men of the National Guard on their discharge from the service of the United States, and to members of the National Guard who have been mustered into the service of the United States, and discharged on account of physical disability; * * * *Act of June 5, 1920* (41 Stat. 959), making appropriations for the support of the Army: *Transportation of the Army*.

Sec. 126, act of June 16, 1916, provided that "On and after July first, nineteen hundred and sixteen, an enlisted man when discharged from the service, except by way of punishment for an offense, shall receive 3½ cents per mile from the place of his discharge to the place of his acceptance for enlistment, enrollment, or original muster into the service, at his option."

This section superseded a provision of act of Aug. 24, 1912 (37 Stat. 576), which read as follows: "Hereafter when an enlisted man is discharged from the service, except by way of punishment for an offense, he shall be entitled to transportation in kind and subsistence from the place of his discharge to the place of his enlistment, or to such other place within the continental limits of the United States as he may select, to which the distance is no greater than from the place of discharge to place of enlistment; but if the distance be greater he may be furnished with transportation in kind and subsistence for a distance equal to that from place of discharge to place of enlistment, or, in lieu of such transportation and subsistence, he shall, if he so elects, receive 2 cents a mile, except for sea travel, from the place of his discharge to the place of his enlistment."

Said provision of act of Aug. 24, 1912 (37 Stat. 576), superseded a similar provision of act of Mar. 2, 1901 (31 Stat. 902).

Notes of Decisions.

Repeal of statute.—See *Reichherzer v. U. S.* (1908), 43 Ct. Cl. 359.

Construction of section in general.—No exception, other than the one declared in this section, can be made thereto. *Thornton v. U. S.* (1892), 27 Ct. Cl. 342.

Discharge from service.—An enlisted man is not entitled to transportation unless his connection with the Army be actually and finally severed. His connection with the Army is not actually and finally severed if his discharge is consequent to his appointment as a commissioned officer, and merely a formality in his promotion. In such a case he remains continuously in the service, and is never in a condition where he can demand

transportation in kind. *Reichman v. U. S.* (1889), 24 Ct. Cl. 485.

On request.—A soldier discharged at his own request, before the expiration of the period of his enlistment, is entitled to transportation, or commutation thereof, from the place of his discharge to the place of his enlistment. *Thornton v. U. S.* (1892), 27 Ct. Cl. 342; *Barnett v. U. S.* (1901), 37 Ct. Cl. 49; contra, see *U. S. v. Barnett* (1903), 23 Sup. Ct. 639, 189 U. S. 474, 47 L. Ed. 908.

Unfit for service, etc.—A private in a marine corps, discharged without court-martial "as unfit for service" and of bad character, is entitled to transportation and subsistence from the place of his dis-

charge to that of his enlistment. *U. S. v. Kingsley* (1891), 11 Sup. Ct. 286, 287, 138 U. S. 87, 84 L. Ed. 896.

Place of enlistment.—Where a soldier's first discharge is followed by his reenlistment within a few days, so that his service is practically continuous, and his second discharge occurs at the place of his original enlistment, he is not entitled to commutation for travel and subsistence to

the place of his second enlistment. *U. S. v. Thornton* (1896), 16 Sup. Ct. 415, 416, 160 U. S. 654, 40 L. Ed. 570.

Forfeiture of right to travel allowance.—A soldier does not forfeit his right to travel allowance by accepting free transportation on a Government transport; but from this must be deducted the cost of subsistence on the transport. *Reichhermer v. U. S.* (1908), 43 Ct. Cl. 359.

1803. Mileage of enlisted men discharged to reenlist.—That those enlisted men of the Army who enlisted in the Regular Army prior to April 2, 1917, and who have accepted or may accept their discharge from such enlistment in order to reenlist under the terms of the Act entitled "An Act to authorize the resumption of voluntary enlistment in the Regular Army, and for other purposes," approved February 28, 1919, shall upon such discharge receive travel pay at the rate provided in the Act entitled "An Act permitting any person who has served in the United States Army, Navy, or Marine Corps in the present war to retain his uniform and personal equipment, and to wear the same under certain conditions," approved February 28, 1919, from the place of such discharge to their actual bona fide home or residence or original muster into the service, as they may elect. * * * *Joint Res. 14, Sept. 29, 1919 (41 Stat. 291).*

1804. Vacant.

1805. Mileage of National Guardsmen on discharge from Federal service.—Nothing contained in the Act making appropriations for the support of the Army for the fiscal year nineteen hundred and seventeen shall be construed as precluding the payment of travel allowance as provided in section one hundred and twenty-six of the Act approved June third, nineteen hundred and sixteen, to enlisted men of the National Guard on their discharge from the service of the United States and the appropriation for the transportation of the Army and its supplies for the fiscal year nineteen hundred and seventeen shall be available for this purpose and also for the purpose of paying travel pay to officers of the National Guard on their discharge from the service of the United States, as prescribed in the Act approved March second, nineteen hundred and one. *Act of Sept. 8, 1916 (39 Stat. 810).*

See 1802, ante.

1806. Return to the United States of veterans of the World War of Polish origin.—Whereas there are now in concentration camps at or near Warsaw, Poland, and have been since November, 1919, upward of twelve thousand residents of the United States of Polish origin who were equipped and transported at the expense of Great Britain and France from the United States to Poland and who were engaged in active service in behalf of the allied cause during the war; and

Whereas they are desirous of returning to their homes in this country and are without means to accomplish such repatriation: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That authority be, and hereby is, given to the Secretary of War to use such Army transports as may be available to bring back to the United States from Danzig, Poland, such residents of the United States of Polish origin as were engaged in the war on the side of the allied and associated powers. *Joint Res. 31, March 10, 1920 (41 Stat. 528).*

1807. Traveling expenses of wives of enlisted men.—The Secretary of War is authorized to pay for the transportation from Europe to the United States of the wives of soldiers who became such while the soldiers were in Europe. The payment therefor shall be made from funds appropriated for the transportation of the Army and its supplies and at the per capita rates agreed upon for the transportation of the troops. *Act of June 5, 1920 (41 Stat. 1026).*

1808. Traveling expenses and other allowances of Army nurses.—That members of said Nurse Corps shall receive transportation and necessary expenses when traveling under orders, and such allowances of quarters and subsistence and, during illness, such medical care as may be prescribed in regulations by the Secretary of War; and when at places where no public quarters are available, commutation in lieu thereof, and of heat and light therefor at such rates and upon such conditions as are now or shall hereafter be provided by law. *Sec. 6, act of July 9, 1918 (40 Stat. 879).*

1809. Transportation and subsistence of the American National Red Cross.—That when the Red Cross cooperation and assistance with the land and naval forces in time of war or threatened hostilities shall have been accepted by the President, the personnel entering upon the duty specified in section one of this Act shall, while proceeding to their place of duty, while serving thereat, and while returning therefrom, be transported and subsisted at the cost and charge of the United States as civilian employees employed with the said forces, and the Red Cross supplies that may be tendered as a gift and accepted for use in the sanitary service shall be transported at the cost and charge of the United States. *Sec. 2, act of April 24, 1912 (37 Stat. 91).*

1810. Traveling expenses of foreign soldiers attached to the Army of the United States.—The Secretary of War is hereby authorized, under such regulations and in such manner as he may prescribe, to employ such portion of the appropriations made for transportation of the Army and its supplies as in his judgment may be necessary to defray the expenses of travel incurred by officers and enlisted men of foreign armies attached to the Army of the United States during the present emergency, and that those officers and enlisted men, who may have been performing duties in this connection, be reimbursed from this appropriation for the expenditures they have already been obliged to make. *Act of Oct. 6, 1917 (40 Stat. 361).*

1811. Mileage of foreign soldiers on aviation business.— * * * *Provided further,* That during the present emergency, officers and enlisted men of foreign armies attached to the Aviation Section of the Signal Corps as instructors or inspectors when traveling in the United States on official business pertaining to the Aviation Section of the Signal Corps shall be authorized, from funds appropriated by this Act, the same mileage and transportation allowances as are authorized for officers or enlisted men of the Regular Army. *Sec. 9, act of July 24, 1917 (40 Stat. 247).*

That during the present emergency, officers and enlisted men of foreign armies attached to the United States Army as instructors or inspectors when traveling in the United States on authorized official business pertaining to aviation shall be entitled to receive, from funds appropriated by this Act, the same mileage and transportation allowances as are authorized for officers or enlisted men of the Regular Army. *Act of July 9, 1918 (40 Stat. 849), making appropriations for the support of the Army, Signal Corps.*

1812. Actual expenses paid to officers traveling in Alaska.— * * * *Provided,* That hereafter actual expenses only, not to exceed four dollars and fifty

cents per day and cost of transportation when not furnished by the Quartermasters' Department, shall be paid to the officers of the Army, contract surgeons, and dental surgeons, when traveling on duty without troops, under competent orders, within the geographical limits of the Territory of Alaska. *Act of May 11, 1908 (35 Stat. 114), making appropriations for the support of the Army.*

1813. *Per diem allowance for a road commissioner of Alaska.*— * * * and that hereafter any officer of the Army and member of said Board of Road Commissioners who is living with his family while serving as a member of said board within the limits of the Territory of Alaska, and not stationed at a military post, shall be entitled to receive a per diem commutation fixed by the board in lieu of "actual living expenses," as now provided by law; and this provision shall embrace the time during which any member of said board shall have failed in the past to receive any allowance for expense of living by reason of the decision of the Comptroller of the Treasury above referred to, to the effect that said allowance could not be made to an officer living with his family. *Act of Apr. 27, 1914 (38 Stat. 366), making appropriations for the support of the Army.*

The decision of the Comptroller of the Treasury referred to herein was a decision dated Mar. 14, 1913, referred to in the appropriation to which this provision was annexed.

1814. *Expenses of military observers.*— * * * *Provided*, That the actual and necessary expenses of officers of the Army who, after July first, nineteen hundred and fourteen, have been on duty abroad for the purpose of observing operations of armies of foreign States at war, and of officers who may hereafter be on duty abroad for that purpose, shall be paid out of the appropriation for contingencies of the military information section, General Staff Corps, upon certificates of the Secretary of War that the expenditures were necessary for obtaining military information; * * * *Act of Mar. 4, 1915 (38 Stat. 1063).*

For the actual and necessary expenses of officers of the Army on duty abroad for the purpose of observing operations of armies of foreign States at war, to be paid upon certificates of the Secretary of War that the expenditures were necessary for obtaining military information, \$25,000. *Act of June 5, 1920 (41 Stat. 949-950), making appropriations for the support of the Army: Military observers abroad.*

1815. *Expenses of officers, etc., on special aviation duty at home and abroad.*— * * * And also for the actual and necessary expenses of officers, enlisted men, and civilian employees of the Army and authorized agents sent on special duty at home and abroad for aviation purposes, including observation and investigation of foreign military operations and organization, manufacture of aircraft, and engines, also special courses in foreign aviation schools and manufacturing establishments, to be paid upon certificates of the Secretary of War certifying that the expenditures were necessary for military purposes. * * * *Sec. 9, act of July 24, 1917 (40 Stat. 246).*

1816. *Commutation of rations.*— * * * For payments: Of commutation of rations to the cadets of the United States Military Academy in lieu of the regular established ration, at the rate of \$1.08 per ration; of the regulation allowances of commutation in lieu of rations to enlisted men on furlough, enlisted men and male and female nurses when stationed at places where rations in kind can not be economically issued, including warrant officers of the Mine Planter Service, enlisted men of the Regular Army Reserve and retired enlisted men when ordered

to active duty, and when traveling on detached duty where it is impracticable to carry rations of any kind, enlisted men selected to contest for places or prizes in departments and Army rifle competitions while traveling to and from places of contest, male and female nurses on leave of absence, applicants for enlistment, and general prisoners while traveling under orders. For payment of the regulation allowances of commutation in lieu of rations for members of the Army Nurse Corps while on duty in hospital, and for enlisted men, applicants for enlistment while held under observation, civilian employees who are entitled to subsistence at public expense, and general prisoners sick therein, to be paid to the surgeon in charge; * * * *Act of June 5, 1920 (41 Stat. 957), making appropriations for the support of the Army: Subsistence of the Army.*

Under the provisions of the Act of May 12, 1917 (40 Stat. 50), commutation of rations for the Nurse Corps (female and others) was fixed at 40 cents, and for patients at Fort Bayard, N. Mex., at 50 cents.

Notes of Decisions.

Commutation.—Commutation in the military or naval service is money paid in substitution of something to which an officer, soldier, or sailor is entitled. Commutation, being regulated by statutes and regulations, can not be allowed by inferior

authority. The principle which governs the commutation of rations in lieu of subsistence is that commutation will not be allowed where subsistence in kind is provided by the Government. *Jackie v. U. S.*, 28 Ct. Cls., 138.

1817. Commutation of rations for competitors at the national rifle match.—* * * *Provided*, That the sum of \$12,000 is authorized to be expended for supplying meals or furnishing commutation of rations to enlisted men of the Regular Army and the National Guard who may be competitors in the national rifle match: *Provided further*, That no competitor shall be entitled to commutation of rations in excess of \$1.50 per day, and when meals are furnished no greater expense than that sum per man per day for the period the contest is in progress shall be incurred. * * * *Act of June 5, 1920 (41 Stat. 957), making appropriations for the support of the Army: Subsistence of the Army.*

Similar appropriations were made by previous acts.

1818. Commutation of clothing and subsistence to retired enlisted men.—* * * *Provided*, That hereafter a monthly allowance of nine dollars and fifty cents be granted in lieu of the allowance for subsistence and clothing. *Act of Mar. 16, 1896 (29 Stat. 62), making appropriations for the support of the Army.*

See 1705, ante.

1819. Clothing balances.—The money value of all clothing overdrawn by the soldier beyond his allowance shall be charged against him, every six months, on the muster roll of his company, or on his final statements if sooner discharged, and he shall receive pay for such articles of clothing as have not been issued to him in any year, or which may be due to him at the time of his discharge, according to the annual estimated value thereof. The amount due him for clothing, when he draws less than his allowance, shall not be paid to him until his final discharge from the service. *R. S. 1302.*

On July 11, 1917, the President directed that from July 15, 1917, and during the then existing emergency, a soldier's allowance for clothing would be the quantity of clothing necessary and adequate for the service on which he was engaged. See G. O. 80, War Dept., July 11, 1917, and G. O. 119, sec. III, War Dept., Sept. 11, 1917.

1820. Appropriations chargeable with clothing balances.—Clothing balances accumulating to the soldier's credit under section thirteen hundred and two

shall, when payable to him upon his discharge, be paid out of the appropriation for pay of the Army for the then current fiscal year. *R. S. 1308, as amended by act of June 12, 1906 (34 Stat. 246).*

This section, as enacted in the Revised Statutes, read as follows:

"The amounts of deposits and clothing-balances accumulating to the soldier's credit under sections thirteen hundred and two and thirteen hundred and five shall, when payable to him upon his discharge, be paid out of the appropriations for pay of the Army for the then current fiscal year."

For R. S. 1302, mentioned, see 1819, ante.

1821. Laundry, etc., for recruits at depots.—That traders and laundrymen at depots for recruits in the Army be, and hereby are, authorized to furnish such recruits, on credit, with laundry work and such articles as may be necessary for their cleanliness and comfort, at a total cost not to exceed seven dollars in value per man. That muster and pay rolls be made out showing the amounts the recruits respectively owe to the traders and laundrymen, and signed by them before leaving the depot, and that the traders and laundrymen be paid on such rolls, the amount paid for each recruit to be noted accordingly on the muster and descriptive rolls, in order that it may be withheld, after he joins his company, by the paymaster, at the first subsequent payment, under such rules and regulations as may be adopted by the War Department: *Provided*, That this provision shall apply only to recruits on their enlistment, and the credit shall only be allowed on the written order of the regular recruiting officer at said station. *Sec. 3, act of June 30, 1882 (22 Stat. 122), making appropriations for the support of the Army.*

1822. Disposition of the remains of soldiers and civilian employees.—Disposition of remains of officers, soldiers, and civilian employees: For interment, cremation (only upon request from relatives of the deceased), or preparation and transportation to their homes or to such national cemeteries as may be designated by proper authority, in the discretion of the Secretary of War, of the remains of officers, cadets, United States Military Academy, including acting assistant surgeons and enlisted men in active service, and accepted applicants for enlistment; interment, or preparation and transportation to their homes, of the remains of civil employees of the Army in the employ of the War Department who die abroad, in Alaska, in the Canal Zone, or on Army transports, or who die while on duty in the field or at military posts within the limits of the United States; interment of military prisoners who die at military posts; for the interment and shipment to their homes of remains of enlisted men who are discharged in hospitals in the United States and continue as inmates of said hospitals to the date of their death, and for interment of prisoners of war and interned alien enemies who die at prison camps in the United States; removal of remains from abandoned posts to permanent military posts of national cemeteries, including the remains of Federal soldiers, sailors, or marines interred in fields or abandoned private and city cemeteries; and in any case where the expenses of burial or shipment of the remains of officers or enlisted men of the Army who die on the active list are borne by individuals, where such expenses would have been lawful claims against the Government, reimbursement to such individuals may be made of the amount allowed by the Government for such services out of this sum, but no reimbursement shall be made of such expenses incurred prior to July 1, 1910; expenses of the segregation of bodies in permanent American cemeteries in Great Britain and France; in all, \$1,000,000: *Provided*, That the above provisions shall be applicable in the cases of officers and enlisted

men on the retired list of the Army who have died or may hereafter die while on active duty by proper assignment and also to citizens of the United States who may have died while serving in the armies of the Allies associated with the American forces: *Provided further*, That in addition to the foregoing sum, the unobligated balance of the appropriation "Disposition of remains of officers, soldiers, and civil employees," for the fiscal year 1921 is made available during the fiscal year 1922 for the above purposes and for the care and maintenance of graves of officers, soldiers, and civilian employees of the Army abroad, and for the preparation and shipment of their remains to their homes, or to national cemeteries. *Act of Mar. 4, 1921 (41 Stat. 1386-1387), making appropriations for sundry civil expenses: Quartermaster Corps.*

1823. Disposition of remains of deceased vocational trainees.—For * * * funeral and other incidental expenses (including transportation of remains) of deceased trainees of the board. * * * *Act of June 5, 1920 (41 Stat. 887), making appropriations for sundry civil expenses: Vocational rehabilitation.*

1824. Burial expenses of soldiers and Army nurses.—If death occur or shall have occurred subsequent to April 8, 1917, and before discharge or resignation from service, the United States shall pay for burial expenses and the return of body to his home a sum not to exceed \$100, as may be fixed by regulations. *Sec. 301 (g), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 405), as amended by sec. 10, act of Dec. 24, 1919 (41 Stat. 572).*

This part of the original act as amended read as follows: "If the death occurs before discharge or resignation from service, the United States shall pay for burial expenses and the return of the body to his home a sum not to exceed \$100, as may be fixed by regulations."

1825. Burial in national cemeteries.—All soldiers, sailors, or marines dying in the service of the United States, or dying in a destitute condition after having been honorably discharged from the service, or who served, or hereafter shall have served, during any war in which the United States has been, or may hereafter be, engaged, and, with the consent of the Secretary of War, any citizen of the United States who served in the Army or Navy of any government at war with Germany or Austria during the World War and who died while in such service or after honorable discharge therefrom, may be buried in any national cemetery free of cost. The production of the honorable discharge of a deceased man in the former case, and a duly executed permit of the Secretary of War in the latter case, shall be sufficient authority for the superintendent of any cemetery to permit the interment. * * * *R. S. 4878, as amended by act of April 15, 1920 (41 Stat. 552).*

No memorial is to be placed and no body interred within 250 feet of Arlington Memorial Amphitheater. See 1823½, post.

1826. Burial of indigent veterans of the Civil War.—For expenses of burying in the Arlington National Cemetery, or in the cemeteries of the District of Columbia, indigent ex-Union soldiers, ex-sailors, or ex-marines of the United States service, either Regular or Volunteer, who have been honorably discharged or retired and who die in the District of Columbia, to be disbursed by the Secretary of War, at a cost not exceeding \$45 for such burial expenses in each case, exclusive of cost of grave, \$1,000, 60 per centum of which sum shall be paid out of the revenues of the District of Columbia. *Act of Mar. 4, 1921 (41 Stat. 1386), making appropriations for sundry civil expenses: National cemeteries.*

Notes of Decisions.

Officers and seamen of Revenue-Cutter Service.—Commissioned and warrant officers and seamen of the Revenue-Cutter Service, who die in the ordinary administration of

that service in time of peace, are not entitled to the privilege of interment in national cemeteries. (1010) 28 Op. Atty. Gen. 543.

1827. Burial expenses of deceased indigent patients.—Burial of deceased indigent patients: For burying in the Little Rock (Arkansas) National Cemetery, including transportation thereto, indigent ex-soldiers, ex-sailors, or ex-marines of the United States service, either Regular or Volunteer, who have been honorably discharged or retired and who die while patients at the Army and Navy General Hospital, Hot Springs, Arkansas, to be disbursed at a cost not exceeding \$35 for such burial expenses in each case, exclusive of cost of grave, \$200. *Act of Mar. 4, 1921 (41 Stat. 1387), making appropriations for sundry civil expenses: National cemeteries.*

1828. Burial of Army nurses.— * * * Army nurses honorably discharged from their service as such may be buried in any national cemetery, and, if in a destitute condition, free of cost. The Secretary of War is authorized to issue certificates to those army nurses entitled to such burial. *R. S. 4878, as amended by act of April 15, 1920 (41 Stat. 552).*

R. S. 4878, as enacted in the Revised Statutes, did not contain the two sentences set forth here. Said provisions were added, at the end of the original section, by amendment as cited above.

1828½. Memorials in Arlington Memorial Amphitheater.—That a commission is hereby created, to be composed of the Secretary of War and the Secretary of the Navy, which shall submit annually to the President, who shall transmit the same to Congress by the first Monday in December, recommendations as to what, if any, inscriptions, tablets, busts, or other memorials shall be erected, and what, if any, bodies of deceased members of the Army, Navy, and Marine Corps shall be entombed during the next ensuing year within the Arlington Memorial Amphitheater, in the Arlington National Cemetery, Virginia: *Provided*, That no memorial shall be placed and no body shall be interred in the grounds about the Arlington Memorial Amphitheater within a distance of two hundred and fifty feet from the said memorial. *Sec. 1, act of Mar. 4, 1921 (41 Stat. 1440).*

That the Secretary of War shall be the chairman of the said commission and the depot quartermaster of the Army in Washington shall be its executive and disbursing officer. *Sec. 2, act of Mar. 4, 1921 (41 Stat. 1440).*

That no inscription, tablet, bust, or other memorial shall be erected nor shall any body be entombed within the Arlington Memorial Amphitheater unless specifically authorized in each case by Act of the Congress. *Sec. 3, act of Mar. 4, 1921 (41 Stat. 1440).*

That no inscription, tablet, bust, or other memorial as herein provided for shall be erected to commemorate any person who shall not have rendered conspicuously distinguished service in the United States Army, Navy, or Marine Corps, nor shall the body of any such person be entombed in the Arlington Memorial Amphitheater; nor shall any such memorial be erected or any body be entombed therein within ten years after the date of the death of the person so to be commemorated, except as heretofore or hereafter authorized by Congress. *Sec. 4, act of Mar. 4, 1921 (41 Stat. 1440).*

That the character, design, and location of any such inscriptions, tablets, busts, or other memorials when authorized as herein provided shall be sub-

ject to the approval of the commission herein created, which shall in each case obtain the advice of the Commission of Fine Arts. *Sec. 5, act of Mar. 4, 1921 (41 Stat. 1440).*

The burial of an unidentified veteran of the World War in this amphitheater was directed by joint resolution of Mar. 4, 1921 (41 Stat. 1447).

1829. Erection of headstones in private cemeteries.—That the Secretary of War is hereby authorized to erect headstones over the graves of soldiers who served in the Regular or Volunteer Army of the United States during the war for the Union, and who have been buried in private village or city cemeteries, in the same manner as provided by the law of March third, eighteen hundred and seventy-three, for those interred in national military cemeteries; and for this purpose, and for the expenses incident to such work, so much of the appropriation of one million dollars, made in the act above mentioned, as has not been expended, and as may be necessary, is hereby made available. The Secretary of War shall cause to be preserved in the records of his Department the names and places of burial of all soldiers for whom such headstones shall have been erected by authority of this or any former acts. *Act of Feb. 3, 1879 (20 Stat. 281).*

For continuing the work of furnishing headstones of durable stone or other durable material for unmarked graves of Union and Confederate soldiers, sailors, and marines in national, post, city, town, and village cemeteries, naval cemeteries at navy yards and stations of the United States, and other burial places, under the Acts of March 3, 1873, February 3, 1879, and March 9, 1906; continuing the work of furnishing headstones for unmarked graves of civilians interred in post cemeteries under the Acts of April 28, 1904, and June 30, 1906; and furnishing headstones for the unmarked graves of Confederate soldiers, sailors, and marines in national cemeteries, \$120,000. *Act of Mar. 4, 1921 (41 Stat. 1385), making appropriations for sundry civil expenses: National cemeteries.*

The provisions of act of Mar. 3, 1873 (17 Stat. 545), mentioned above, were incorporated into R. S. 4877, ante, 1095. For act of Mar. 9, 1906, see 1831, post.

A specific appropriation for marking civilian graves in post cemeteries appears in the sundry civil appropriation acts of Apr. 28, 1904 (33 Stat. 496), and of June 30, 1906 (34 Stat. 741), respectively, mentioned above.

1830. Monuments, etc., in Cuba and China.—Monuments or tablets in Cuba and China: For repairs and preservation of monuments, tablets, roads, fences, and so forth, made and constructed by the United States in Cuba and China to mark the places where American soldiers fell, \$1,000. *Act of June 5, 1920 (41 Stat. 896), making appropriations for sundry civil expenses.*

1831. Headstones for Confederate veterans.—That the Secretary of War be, and he is hereby, authorized and directed to ascertain the locations and condition of all the graves of the soldiers and sailors of the Confederate army and navy in the late civil war, eighteen hundred and sixty-one to eighteen hundred and sixty-five, who died in Federal prisons and military hospitals in the North and who were buried near their places of confinement; with power in his discretion to acquire possession or control over all grounds where said prison dead are buried not now possessed or under the control of the United States Government; to cause to be prepared accurate registers in triplicate, one for the superintendent's office in the cemetery, one for the Quartermaster-General's Office, and one for the War Record's Office, Confederate archives, of the places of burial, the number of the grave, the name, company, regiment, or vessel and State, of each Confederate soldier and sailor who so died, by verification with the Confederate archives in the War Department at Washington, District of

Columbia; to cause to be erected over said graves white marble headstones similar to those recently placed over the graves in the "Confederate section" in the National Cemetery at Arlington, Virginia, similarly inscribed; to build proper fencing for the preservation of said burial grounds, and to care for said burial grounds in all proper respects not herein specifically mentioned, the said work to be completed within two years, at the end of which a report of the same shall be made to Congress. * * * *Act of Mar. 9, 1906 (34 Stat. 56).*

Provision for the above has been made regularly. See 1829, ante.

The burial of Confederate veterans dying in the District of Columbia in the Arlington National Cemetery was authorized by act of Aug. 24, 1912 (37 Stat. 440). The annual sundry civil acts regularly provide for the maintenance of Confederate burial plats as follows: Confederate Mound, Oakwood Cemetery, Chicago; Confederate Cemetery, North Alton, Ill.; Confederate Cemetery, Rock Island, Ill.; Confederate section, Greenlawn Cemetery, Indianapolis, Ind.; Confederate Cemetery, Point Lookout, Md.; Confederate Stockade Cemetery, Johnstons Island, Sandusky Bay, Ohio; Confederate Cemetery, Camp Chase, Columbus, Ohio.

1832. Transportation of the baggage of deceased civilian employees.— * * * That hereafter, under such regulations as the Secretary of War may prescribe, transportation at public expense may be provided for the baggage of civilian employees who die in the service from their last duty station to such places within the limits of the United States as may be the home of their families, or as may be designated by their legal representatives or executors. * * * *Chap. XVIII, act of July 9, 1918 (40 Stat. 892).*

1833. Settlement of accounts of a deceased soldier.—Hereafter, in the settlement of the accounts of deceased officers or enlisted men of the Army, where the amount due the decedent's estate is less than five hundred dollars and no demand is presented by a duly appointed legal representative of the estate, the accounting officers may allow the amount found due to the decedent's widow or legal heirs in the following order of precedence: First, to the widow; second, if decedent left no widow, or the widow be dead at time of settlement, then to the children or their issue, per stirpes; third, if no widow or descendants, then to the father and mother in equal parts, provided the father has not abandoned the support of his family, in which case to the mother alone; fourth, if either the father or mother be dead then to the one surviving; fifth, if there be no widow, child, father, or mother at the date of settlement, then to the brothers and sisters and children of deceased brothers and sisters, per stirpes: *Provided*, That this Act shall not be so construed as to prevent payment from the amount due the decedent's estate of funeral expenses, provided a claim therefor is presented by the person or persons who actually paid the same before settlement by the accounting officers. *Act of June 30, 1906 (34 Stat. 750), making appropriations for sundry civil expenses.*

See also art. 112, Articles of War, ch. 52, post.

1834. Estate tax not applicable if decedent died in the World War.— * * * The taxes imposed by this title or by Title II of the Revenue Act of 1916 (as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917) or by Title IX of the Revenue Act of 1917, shall not apply to the transfer of the net estate of any decedent who has died or may die while serving in the military or naval forces of the United States in the present war or from injuries received or disease contracted while in such service, and any such tax

collected upon such transfer shall be refunded to the executor. *Sec. 401, act of Feb. 24, 1919 (40 Stat. 1097).*

1835. Gratuity to the heirs of a deceased soldier.—That hereafter, immediately upon official notification of the death from wounds or disease, not the result of his own misconduct, of any officer or enlisted man on the active list of the Regular Army or on the retired list when on active duty, the Quartermaster General of the Army shall cause to be paid to the widow, and if there be no widow to the child or children, and if there be no widow or child to any other dependent relative of such officer or enlisted man previously designated by him, an amount equal to six months' pay at the rate received by such officer or enlisted man at the date of his death. The Secretary of War shall establish regulations requiring each officer and enlisted man having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his death. Said amount shall be paid from funds appropriated for the pay of the Army. *Sec. 1, act of Dec. 17, 1919 (41 Stat., 367).*

That nothing in this Act shall be construed as making the provisions of this Act applicable to officers or enlisted men of any forces or troops of the Army of the United States other than those of the Regular Army, and nothing in this Act shall be construed to apply in commissioned grades to any officers except those holding permanent or provisional appointments in the Regular Army. *Sec. 2, act of Dec. 17, 1919 (41 Stat., 367).*

Act of May 11, 1908 (38 Stat. 108), as amended by act of Mar. 3, 1909 (35 Stat. 735), provided that: "Hereafter immediately upon official notification of the death from wounds or disease not the result of his own misconduct of any officer or enlisted man on the active list of the Army, the Paymaster General of the Army shall cause to be paid to the widow of such officer or enlisted man, or to any other person previously designated by him, an amount equal to six months' pay at the rate received by such officer or enlisted man at the date of his death, less seventy-five dollars in the case of an officer and thirty-five dollars in the case of an enlisted man. From the amount thus reserved the Quartermaster's Department shall be reimbursed for expenses of interment, and the residue, if any, of the amount reserved, shall be paid subsequently to the designated person. The Secretary of War shall establish regulations requiring each officer and enlisted man to designate the proper person to whom this amount shall be paid in case of his death, and said amount shall be paid to that person from funds appropriated for the pay of the Army."

1836. Gratuity to heirs of a person killed in an aviation accident.— * * * *Provided further,* That there shall be paid to the widow of any officer or enlisted man who shall die as the result of an aviation accident, not the result of his own misconduct, or to any other person designated by him in writing, an amount equal to one year's pay at the rate to which such officer or enlisted man was entitled at the time of the accident resulting in his death, but any payment made in accordance with the terms of this proviso on account of the death of any officer or enlisted man shall be in lieu of and a bar to any payment under the Acts of Congress approved May eleventh, nineteen hundred and eight, and March third, nineteen hundred and nine (Thirty-fifth Statutes, pages one hundred and eight and seven hundred and fifty-five), on account of death of said officer or enlisted man. *Sec. 3, act of July 18, 1914 (38 Stat. 516).*

The reference here is evidently intended to be seven hundred and thirty-five instead of seven hundred and fifty-five; see note to 7835, ante.

1837. Suits for damages by the estates of persons killed at sea.—That whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the

United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued. *Sec. 1, act of March 30, 1920 (41 Stat. 537).*

That such suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered. *Sec. 3, act of March 30, 1920 (41 Stat. 537).*

That if a person die as the result of such wrongful act, neglect, or default as is mentioned in section 1 during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this Act for the recovery of the compensation provided in section 2. *Sec. 5, act of March 30, 1920 (41 Stat. 537).*

That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act. Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone. *Sec. 7, act of March 30, 1920 (41 Stat. 538).*

That this Act shall not affect any pending suits, action, or proceeding. *Sec. 8, act of March 30, 1920 (41 Stat. 538).*

1838. Recovery of damages by estates of persons killed at sea.—That the recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. *Sec. 2, act of March 30, 1920 (41 Stat. 537).*

That whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding. *Sec. 4, act of March 30, 1920 (41 Stat. 537).*

That in suits under this Act the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly. *Sec. 6, act of March 30, 1920 (41 Stat. 537-538).*

CHAPTER 28.

PENSIONS AND COMPENSATION FOR DISABILITIES AND DEATH.

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Historical Note.

This chapter is not intended to give a full statement of the pension laws, but only so much thereof as will show the general policy of the Government in regard to pensions and furnish the information necessary to enable officers to answer the questions likely to arise in the service. For a full statement of the law on the subject, reference is made to the publication of the Pension Bureau, "Laws of the United States governing the granting of Army and Navy pensions and bounty lands," etc.

Pensions for disability incurred in the service were granted by R. S. 4692.

Pensions to soldiers and sailors who served ninety days or more in the War of the Rebellion and who are incapacitated for the performance of manual labor, and to their widows and children and dependent parents, were granted by the Invalid Pension act of June 27, 1890, as amended by act of May 9, 1900 (26 Stat. 182; 31 Stat. 170).

Pensions to soldiers of the Indian Wars and to their widows were granted by act of July 27, 1892, act of June 27, 1902, and act of May 30, 1908 (27 Stat. 281, 282; 32 Stat. 399; 35 Stat. 553).

Pensions to soldiers and sailors of the Mexican War and to their widows were granted by R. S. 4730, 4731, and by act of Jan. 29, 1887 (24 Stat. 371, 372), act of Jan. 5, 1893 (27 Stat. 413), act of April 23, 1900 (31 Stat. 187), and act of Mar. 3, 1903 (32 Stat. 1228).

Pensions to army nurses were granted by act of Aug. 5, 1892 (27 Stat. 348).

Pensions to any person who served 90 days or more in military or naval service of the United States during the Civil War, or 60 days or more in the war with Mexico, were granted by the service pension act, act of May 11, 1912 (37 Stat. 112, 113, 1019).

No pension was to be allowed or paid to any officer or enlisted man in the Revenue-Cutter Service by a provision of act of May 27, 1908 (35 Stat. 322).

Pensions to all persons who served 90 days or more in military or naval service of the United States during the War with Spain, the Philippine insurrection, and the China relief expedition were granted by act of June 5, 1920 (41 Stat. 982-983).

No person duly appointed or commissioned to be an officer of the volunteer service during the War of the Rebellion, and who was subject to the mustering regulations at the time, was to be held to have been mustered into the service and the grade named in his appointment or commission from the date from which he was to take rank under its terms, whether it was actually received by him or not and was entitled to pay, etc., and pension as if actually mustered at that date, by act of Feb. 24, 1897 (29 Stat. 593), which is no longer operative. See 1707, ante.

Officers of the Officers' Reserve Corps were entitled to pensions only for disability incurred in the line of duty and while in active service, by a provision of sec. 38, act of June 3, 1916 (39 Stat. 190), which was stricken out by sec. 31, act of June 4, 1920 (41 Stat. 775).

Members of the Regular Army Reserve were entitled to pensions only through disability incurred while on active duty in the service of the United States by a provision of sec. 32, act of June 3, 1916 (39 Stat. 188), which was stricken out by sec. 31, act of June 4, 1920 (41 Stat. 775).

For pensions to widows and children, see 1851, post, and notes thereto.

1839. Pensions for disabilities.—Every person specified in the several classes enumerated in the following section, who has been, since the fourth day of March, eighteen hundred and sixty-one, or who is hereafter disabled under the conditions therein stated, shall, upon making due proof of the fact, according to such forms and regulations as are or may be provided in pursuance of law, be placed on the list of invalid pensioners of the United States, and be entitled to receive, for a total disability, or a permanent specific disability, such pension as is hereinafter provided in such cases; and for an inferior disability, except in cases of permanent specific disability, for which the rate of pension is expressly provided, an amount proportionate to that provided for total disability; and such pension shall commence as hereinafter provided, and continue during the existence of the disability. *R. S. 4692.*

* * * The laws providing for gratuities or payments in the event of death in the service and existing pension laws shall not be applicable after the

enactment of this amendment to any person in the active military or naval service on the sixth day of October, nineteen hundred and seventeen, or who thereafter entered the active military or naval service, or to their widows, children, or their dependents, except in so far as rights under any such law have heretofore accrued. * * * *Sec. 312, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 408), as amended by sec. 17, act of June 25, 1918 (40 Stat. 613).*

Section 4693 is set out post, 1841.

See 1835, ante.

The above change of policy is based on institution of compensation for disability and war-risk insurance.

Notes of Decisions.

Disability.—The disability mentioned in act of Apr. 23, 1800, in order to warrant an application to be admitted on the roll, is that degree of personal disability which renders the individual less able to provide for his subsistence. The word "disabled" means any degree of personal disability which renders the individual less able to provide for his subsistence. (1832) 2 Op. Atty. Gen. 542.

The granting of a pension for "permanent specific disability" does not necessarily imply an adjudication that the disability is one which can not terminate. A disability may properly be said to be permanent when it appears to be chronic or of indefinite future duration. (1896) 21 Op. Atty. Gen. 287.

Characteristics of pension and nature of pension system.—While there is no vested right in a pension which can not be divested by the mere exercise of the legislative will, if the beneficiaries thereof have any rights, they are vested ones so long only as the statute creating the pension remains in force and unchanged, subject to be divested at any time that the legislature may desire. While such a statute, therefore, is in full force, and the right of the beneficiary under it has accrued and is permitted to exist, the rules for the interpretation of contracts may be applied in determining the right of the parties. *Rudolph v. U. S.* (1911), 36 App. D. C. 379.

A pension is a periodical allowance of money to a person, in the nature partly of a gratuity and partly of payment for past benefits conferred; payment because it is supposed to be in consideration of previous services rendered to the Government or the public, for which the compensation before made, if any, was inadequate in proportion to the benefits received and the ability of the Nation in its prosperity to

pay; a gratuity because it is not ordinarily founded on contract, and in such case can not be demanded as a legal right until the Government has acknowledged its moral obligation and made the grant. As it is purely voluntary, its payment must be made and accepted in exact conformity with the terms of the grant, and must be subject to the limitations, conditions, and exceptions therein contained. *Donnelly v. U. S.* (1881), 17 Ct. Cl. 105, 108.

A pension is a gratuity involving no claim of right, nor agreement of parties, nor rights of third persons. *Harrison v. U. S.* (1885), 20 Ct. Cl. 122.

The whole system of pensions is part of the Military Establishment of the Government. (1855) 7 Op. Atty. Gen. 594.

Power of Congress over pensions.—Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute, or recall, at its discretion. No pensioner has any vested right to his pension. *McCulloch v. Maryland* (1819), 4 Wheat. (17 U. S.) 316; [C. S. p. 9799].

Disease contracted in transitu.—See (1882) 17 Op. Atty. Gen. 457; note under 1841, post.

Accrued pensions.—A sergeant in the Marine Corps who, prior to the enactment of the war-risk insurance act of Oct. 6, 1917, had served in the corps for more than 21 years and who had become "disabled from sea service" by a wound received in action in June, 1916, but who, though entitled to honorable discharge from the service upon Oct. 6, 1917, did not actually receive his discharge until Nov. 5, 1917, is entitled both to the benefits of R. S. 4756 and also to whatever allowance he may be otherwise entitled to under the provisions of the war-risk insurance act. 31 Op. Atty. Gen. 296.

1840. Pensions based on injuries in line of duty.—No person shall be entitled to a pension by reason of wounds or injury received or disease contracted in the service of the United States subsequent to the twenty-seventh day of July,

eighteen hundred and sixty-eight, unless the person who was wounded, or injured, or contracted the disease was in the line of duty; and, if in the military service, was at the time actually in the field, or on the march, or at some post, fort, or garrison, or en route, by direction of competent authority, to some post, fort, or garrison; or, if in the naval service, was at the time borne on the books of some ship or other vessel of the United States, at sea or in harbor, actually in commission, or was at some naval station, or on his way, by direction of competent authority, to the United States, or to some other vessel or naval station, or hospital. *R. S. 4694.*

* * * *Provided*, That all applicants for pensions shall be presumed to have had no disability at the time of enlistment; but such presumption may be rebutted. *Act of Mar. 3, 1885 (23 Stat. 362).*

Notes of Decisions.

Line of duty.—A statement that the applicant contracted a certain disease in the line of his duty is not false if, though he had it before enlisting, he was then cured, and contracted it again while in the service. *Rhodes v. U. S. (1897), 79 Fed. 740, 25 C. C. A. 186.*

A seaman disabled by punishment inflicted by an enemy for endeavoring to escape from him after having been taken prisoner, is within the spirit and letter of act of Apr. 23, 1800, granting pensions to seamen disabled whilst in the line of their duty. (1821), 1 Op. Atty. Gen. 461.

When the statute provides pension for disability or death, occasioned by wounds or injuries received, casualty occurring, or disease contracted, in the line of duty, it intends that the performance of duty must have relation of causation or consociation, mediate or immediate, to the wound, the casualty, the injury, or the disease which produces the disability or death. (1865) 7 Op. Atty. Gen. 150.

To determine the right of pension, the question is not whether, when the cause of disability or death occurred, the party was on duty or not, in active service, or on furlough or leave, in arrest or not, but whether, in any of the possible conditions

of service, the cause of disability or death was appurtenant to, dependent upon, or connected with, acts, within, or acts without, the line of duty. *Id.*

It is according to public policy to presume in favor of the service, where the line of duty enters potentially into the causes of disability or death, although it be not certainly provable that it was the exclusive or predominant cause. *Id.*

The phrase "in the line of duty," has been uniformly used in the statutes in defining the right to pensions. (1881) 17 Op. Atty. Gen. 172.

Injury due to misconduct.—If an assault on a claimant was brought on by his own misconduct, he can not be said to have been disabled while in the line of duty, and is not entitled to a pension. If there did not intervene between the contact and the injury an adequate and sufficient cause, for which claimant was responsible, he is entitled to pension. A wound is such an improbable effect of duty in the service as to throw upon the applicant the burden of showing that his misconduct was not the cause of the injury, but if this is done with reasonable certainty the claim should be allowed. (1881) 17 Op. Atty. Gen. 172.

1841. Persons in military service eligible for pensions.—The persons entitled as beneficiaries under the preceding section are as follows:

First. Any officer of the Army, including regulars, volunteers, and militia, or any officer in the Navy or Marine Corps, or any enlisted man, however employed, in the military or naval service of the United States, or in its Marine Corps, whether regularly mustered or not, disabled by reason of any wound or injury received, or disease contracted, while in the service of the United States and in the line of duty.

Second. Any master serving on a gunboat, or any pilot, engineer, sailor, or other person not regularly mustered, serving upon any gunboat or war vessel of the United States, disabled by any wound or injury received, or otherwise

incapacitated while in the line of duty, for procuring his subsistence by manual labor.

Third. Any person not an enlisted soldier in the Army, serving for the time being as a member of the militia of any State, under orders of an officer of the United States, or who volunteered for the time being to serve with any regularly organized military or naval force of the United States, or who otherwise volunteered and rendered service in any engagement with rebels or Indians, disabled in consequence of wounds or injury received in the line of duty in such temporary service. But no claim of a State militiaman, or non-enlisted person, on account of disability from wounds, or injury received in battle with rebels or Indians, while temporarily rendering service, shall be valid unless prosecuted to a successful issue prior to the fourth day of July, eighteen hundred and seventy-four.

Fourth. Any acting assistant or contract surgeon disabled by any wound or injury received or disease contracted in the line of duty while actually performing the duties of assistant surgeon or acting assistant surgeon with any military force in the field, or in transitu, or in hospital.

Fifth. Any provost-marshal, deputy provost-marshal, or enrolling-officer disabled, by reason of any wound or injury, received in the discharge of his duty, to procure a subsistence by manual labor. *R. S. § 4693.*

See "Historical Note" at head of this chapter.

Notes of Decisions.

Officers.—The fact that a pension is granted by the express terms of a statute will not authorize a court to hold by construction that it was because he was an officer in the Army. *Byrnes v. U. S.* (1891), 26 Ct. Cl. 302.

Professors of Military Academy.—The professors of the Military Academy at West Point are commissioned officers of the Army, whose pay and allowances are assimilated to those of a lieutenant colonel and a colonel; and in case of such disability as is described in this section they are entitled to pensions at the same rate with officers of the rank of lieutenant colonel. (1882) 17 Op. Atty. Gen. 359.

Volunteer not mustered.—A person who enlisted in the Forty-seventh Regiment of the Pennsylvania Militia pursuant to the President's proclamation for volunteers to serve for six months, which regiment was not actually mustered into service of the United States, but was engaged in the service of the United States under the command of an officer of the United States

Army, has a pensionable status within this subdivision. (1892) 20 Op. Atty. Gen. 322.

Contract surgeon.—The fact that a contract surgeon is entitled to a pension does not affect his rights to longevity pay under another statute. *Byrnes v. U. S.* (1891), 26 Ct. Cl. 302.

Disease contracted in transitu.—Where a contract surgeon went aboard a steamer to proceed to the place to which he had been ordered, but before the departure of the boat, he became sick, and was removed to a hospital, where he died in a few days of typhoid fever, leaving a dependent mother, but no widow or child, held, that the dependent mother is entitled to be enrolled as a pensioner, on the ground that the deceased, when taken down with sickness, was "in transitu" under orders. (1882) 17 Op. Atty. Gen. 457.

When an officer is ordered to go to a given point for duty and has set about his preparations to go, his transitu has begun. (1882) 17 Op. Atty. Gen. 457.

1842. National Guardsmen entitled to pensions.—That when any officer, non-commissioned officer, or private of the militia is disabled by reason of wounds or disabilities received or incurred in the service of the United States he shall be entitled to all the benefits of the pension laws existing at the time of his service, and in case such officer, noncommissioned officer, or private dies in the service of the United States or in returning to his place of residence after being mustered out of such service, or at any time, in consequence of wounds or disabilities received in such service, his widow and children, if any, shall

be entitled to all the benefits of such pension laws. *Sec. 22, act of Jan. 21, 1903 (32 Stat. 779).*

When any officer or enlisted man of the National Guard drafted into the service of the United States in time of war is disabled by reason of wounds or disability received or incurred while in the active service of the United States in time of war, he shall be entitled to all the benefits of the pension laws existing at the time of his service, and in case such officer or enlisted man dies in the active service of the United States in time of war or in returning to his place of residence after being mustered out of such service, or at any other time in consequence of wounds or disabilities received in such active service, his widow and children, if any, shall be entitled to all the benefits of such pension laws. *Sec. 112, act of June 3, 1916 (39 Stat. 211).*

That the provisions of section one hundred and twelve of the national defense Act of June third, nineteen hundred and sixteen, shall be applicable to any officer or enlisted man drafted into the service of the United States pursuant to the provisions of this joint resolution. *Sec. 2, Joint Res. 23, July 1, 1916 (39 Stat. 340).*

1843. Pensions not granted to soldiers while in military service.—The period of service of all persons entitled to the benefits of the pension-laws, or on account of whose death any person may become entitled to a pension, shall be construed to extend to the time of disbanding the organization to which such persons belonged, or until their actual discharge for other cause than the expiration of the service of such organization. *R. S. 4701.*

Officers absent on sick-leave, and enlisted men absent on sick-furlough, or on veteran-furlough with the organization to which they belong, shall be regarded in the administration of the pension laws in the same manner as if they were in the field or hospital. *R. S. 4700.*

* * * *And provided further,* That hereafter no pension shall be allowed or paid to any officer, noncommissioned officer, or private in the Army, Navy, or Marine Corps of the United States, either on the active or retired list.
* * * *Act of Mar. 3, 1891 (26 Stat. 1082).*

The act of Mar. 3, 1891, set out here, superseded a provision excluding retired officers of the Army, Navy, or Marine Corps from the pension list contained in sec. 2, act of Aug. 20, 1890 (26 Stat. 371).

This provision also superseded R. S. 4724, which provided that no person in the Army, Navy, or Marine Corps should draw both a pension as an invalid and the pay of his rank or station in the service, unless the disability for which the pension was granted be such as to occasion his employment in a lower grade, or in the civil branch of the service.

Notes of Decisions.

Construction and operation.—Under the pension appropriation act of Aug. 20, 1890 (26 Stat. 370), and this act, no pension moneys can be drawn by retired officers of the Army, Navy, or Marine Corps after

the date of the former act, but these two statutes are not to be given a retrospective effect so as to cut off arrears already due. (1896) 21 Op. Atty. Gen. 408.

1844. Pension according to rank when injured.—Every commissioned officer of the Army, Navy, or Marine Corps shall receive such and only such pension as is provided in the preceding section, for the rank he held at the time he received the injury or contracted the disease which resulted in the disability, on account of which he may be entitled to a pension; and any commission or presidential appointment, regularly issued to such person, shall be taken to

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determine his rank from and after the date, as given in the body of the commission or appointment conferring said rank: *Provided*, That a vacancy existed in the rank thereby conferred; that the person commissioned was not disabled for military duty; and that he did not willfully neglect or refuse to be mustered. *R. S. 4696.*

Notes of Decisions.

Rank—Invalid pension.—The date of the | on the lineal, not the brevet, rank of such
invalid pension of an Army officer depends | officer. (1853), 6 Op. Atty. Gen. 88.

1845. Age of 62 years and over a permanent specific disability.— * * * *And provided further*, That hereafter the age of sixty-two years and over shall be considered a permanent specific disability within the meaning of the pension laws. * * * *Act of March 4, 1907 (34 Stat. 1406).*

1846. Pension agents to take no fees.—Every pension agent, or other person employed or appointed by him, who takes, receives, or demands any fee or reward from any pensioner for any service in connection with the payment of his pension, shall be fined not more than five hundred dollars. *Sec. 108, Criminal Code, act of March 4, 1909 (35 Stat. 1107).*

1847. Payment of pensions of veterans in the Soldiers' Home.—That any inmate of the Home who is receiving a pension from the Government, and who has a child, wife, or parent living, shall be entitled, by filing with the pension agent from whom he receives his money a written direction to that effect, to have his pension, or any part of it, paid to such child, wife, or parent. The pensions of all who now are or shall hereafter become inmates of the Home, except such as shall be assigned as aforesaid, shall be paid to the treasurer of the Home. The money thus derived shall not become a part of the funds of the Home, but shall be held by the treasurer in trust for the pensioner to whom it would otherwise have been paid, and such part of it as shall not sooner have been paid to him shall be paid to him on his discharge from the institution. The board of commissioners may from time to time pay over to any inmate such part of his pension money as they think best for his interest and consistent with the discipline and good order of the Home, but such pensioner shall not be entitled to demand or have the same so long as he remains an inmate of the Home. In case of the death of any pensioner, any pension money due him remaining in the hands of the treasurer shall be paid to his legal heirs, if demand is made within three years; otherwise the same shall escheat to the Home. *Sec. 4, act of Mar. 3, 1883 (22 Stat. 564).*

1848. Payment of pensions of veterans in the National Home for Disabled Volunteer Soldiers.—* * * such of these as have neither wife, child, nor parent dependent upon them, on becoming inmates of this home, or receiving relief therefrom, shall assign thereto their pensions when required by the board of managers, during the time they shall remain therein or receive its benefits. *R. S. 4832.*

All pensions payable, or to be paid under this act, to pensioners who are inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the treasurer or treasurers of said home, upon security given to the satisfaction of the managers to be disbursed for the benefit of the pensioners without deduction for fines or penalties under regulations to be established by the managers of the home; said payment to be made by the pension agent upon a certificate of the proper officer of the home that the pensioner is an inmate thereof and is still living. Any balance of the pension which may remain at the date

of the pensioner's discharge shall be paid over to him; and in case of his death at the home, the same shall be paid to the widow, or children or in default of either to his legal representatives. *Sec. 2, act of Feb. 26, 1881 (21 Stat. 350), making appropriations for pensions.*

That all pensions and arrears of pensions payable or to be paid to pensioners who are or may become inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the treasurers of said home, to be applied by such treasurers as provided by law, under the rules and regulations of said home. Said payments shall be made by the pension agent upon a certificate of the proper officer of the home that the pensioner is an inmate thereof on the day to which said pension is drawn. The treasurers of said home, respectively, shall give security, to the satisfaction of the managers of said home, for the payment and application by them of all arrears of pension and pension-moneys they may receive under the aforesaid provision. And section two of the act entitled "An act making appropriations for the payment of invalid and other pensions of the United States for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for deficiencies, and for other purposes," approved February twenty-sixth, eighteen hundred and eighty-one, is hereby revived and continued in force. *Sec. 1, act of Aug. 7, 1882 (22 Stat. 322), making appropriations for sundry civil expenses.*

Sec. 1 of the act of Feb. 26, 1881, made appropriations for payment of pensions for said fiscal year, which were the pensions referred to in this section as "payable, or to be paid under this act."

Notes of Decisions.

Assignment of pensions.—The assignment of his pension certificate by an inmate of the National Home for Volunteer Soldiers, under this section, does not give to the managers of that institution a right to collect or receive the pension therein mentioned for any period of time other than that during which he remains an inmate of the home or receives its benefits. (1879) 16 Op. Atty. Gen. 374.

Payment of arrears.—Where the Pension Bureau paid arrears due to an old soldier to the treasurer of the home of which he was an inmate, the obligations of the

United States have been fully carried out. *O'Mara v. U. S. (1911), 47 Ct. Cl. 27.*

The home is not authorized to collect or receive arrearages of pensions under act Jan. 25, 1879, either on assignment or otherwise. (1879) 16 Op. Atty. Gen. 374.

Payment of arrears of pension to the home for prudential or other reasons, except when made in accordance with law, will not relieve the Government of its obligation to the pensioner. Assignments not warranted by special enactment are forbidden by R. S. 4745, post, 1857. *Id.*

1849. Payment of pensions to veterans in State soldiers' homes.—* * * *And provided further*, That from and after the passage of this Act all pensioners who may be inmates of any soldiers' and sailors' home, or other institution maintained by any State for the benefit of dependent or other disabled volunteer soldiers, shall have their respective pensions paid to them directly instead of to the treasurer or other officer of the home or institution at which they may be respectively located. *Act of May 28, 1908 (35 Stat. 419).*

1850. Pension apportioned to the wife or child of a veteran.—That section forty-seven hundred and seventy-six, Title fifty-seven, of the Revised Statutes of the United States, be, and the same is hereby, amended by adding thereto the following additional provisions and provisos, to wit: * * * *Provided further*, That when a soldier or sailor enters into a State home for soldiers or sailors as an inmate thereof, one-half of his pension accruing during his residence therein shall be paid to his wife, she being a woman of good moral character and in necessitous circumstances, or if there be no wife, then to his child or

children under sixteen years of age, or his permanently helpless and dependent child, if any, unless such wife and children shall also be inmates of the same institution or of some home provided for the wives and children of soldiers and sailors: *Provided further*, That if any such pensioner is or shall become an inmate of a National Soldiers' Home one-half of the pension drawn in his behalf or to which he may become entitled during his residence therein shall be paid by the treasurer of that institution to such pensioner's wife, she being in necessitous circumstances and a woman of good moral character, or, if there be no wife, to the legal guardian of the minor child or children, or the permanently dependent and helpless child or children of such pensioner, on the order of the Commissioner of Pensions: * * * *Act of Mar. 3, 1899 (30 Stat. 1379-1380), amending R. S. 4776.*

1851. Pensions to widows and children.—If any person embraced within the provisions of sections forty-six hundred and ninety-two and forty-six hundred and ninety-three has died since the fourth day of March, eighteen hundred and sixty-one, or hereafter dies, by reason of any wound, injury, or disease which under the conditions and limitations of such sections would have entitled him to an invalid pension had he been disabled, his widow, or if there be no widow, or in case of her death without payment to her of any part of the pension hereinafter mentioned, his child or children under sixteen years of age, shall be entitled to receive the same pension as the husband or father would have been entitled to had he been totally disabled, to commence from the death of the husband or father, to continue to the widow during her widowhood, and to his child or children until they severally attain the age of sixteen years, and no longer; and if the widow remarry, the child or children shall be entitled from the date of remarriage, except when such widow has continued to draw the pension-money after her remarriage, in contravention of law, and such child or children have resided with and been supported by her, their pension will commence at the date to which the widow was last paid. *R. S. 4702, as amended by sec. 1, act of Aug. 7, 1882 (22 Stat. 345).*

See ante, 1839 and 1841.

Pensions to widows of soldiers and sailors of the War of 1812 were granted by act of Mar. 9, 1878 (20 Stat. 27-28).

Provisions for the restoration of pensions to widows of officers and enlisted men within the classes named by paragraphs 1, 2, and 3 of R. S. 4693, on renewed widowhood, were made by R. S. 4708, as amended by act of Feb. 28, 1903, and by act of Sept. 8, 1916 (39 Stat. 845).

Notes of Decisions.

When statute applies.—This section applies only where the ex-soldier dies from the wound, injury, or disability on account of which the pension was granted. *Railway Co. v. Maddy* (1893), 21 S. W. 472, 57 Ark. 311.

Right to pension—Necessities.—The right to pension widow and children does not depend on the necessities of the parties. (1836) 3 Op. Atty. Gen. 71.

The theory of military pensions is that the Government will maintain those who have been deprived of the support which a father, a husband, or a son might have provided if he had not devoted himself to the military service of his country. But

upon nothing short of clear and positive enactments can the Government be required to give to a woman the pension of one husband while she is being supported by another. *Poucher v. U. S.* (1865), 1 Ct. Cl. 207; *U. S. v. Hays* (C. C. 1884), 20 Fed. 710.

Rights of children.—"His child or children," one or many, "shall be entitled." It is clear that the whole is given to the offspring of the father as a class. If there is more than one child, they have a joint estate, so to speak, in the pension. The statute disposes of the whole. No part of it reverts or falls back to the Government until the last child arrives at the

age of 16 years or until his death before reaching that age. (1882) 17 Op. Atty. Gen. 339.

Payment to persons entitled.—The law clearly contemplates that the widow and children, as provided by the statute, shall be the beneficiaries and not the general

creditors of the pensioner, and unless the payment has been legally received by the pensioner, it is incumbent on those intrusted with the administration of the law neither to make nor allow payment to be made to any other person. (1887) 19 Op. Atty. Gen. 5.

1852. Presumption of death of a former soldier.—That in considering claims filed under the pension laws, the death of an enlisted man or officer shall be considered as sufficiently proved if satisfactory evidence is produced establishing the fact of the continued and unexplained absence of such enlisted man or officer from his home and family for a period of seven years, during which period no intelligence of his existence shall have been received. And any pension granted under this Act shall cease upon proof that such officer or enlisted man is still living. *Act of Mar. 13, 1896 (29 Stat. 57).*

1853. Proof of marriage requisite for a widow's pension.—That section * * * be, and the same is hereby, amended by adding thereto the following provisions and provisos, to wit: * * * *Provided further,* That hereafter no pension under any law of the United States shall be granted, allowed, or paid to the widow of a soldier, sailor, officer, naval or military, marine, marine officer, or any other male person entitled to a pension under any law of the United States, unless it shall be proved and established that the marriage of such widow to the soldier, sailor, officer, marine, or other person on account of whose service the pension is asked, was duly and legally contracted and entered into prior to the passage of this Act, or unless such wife shall have lived and cohabited with such soldier, sailor, officer, marine, marine officer, or other person continuously from the date of the marriage to the date of his death, or unless the marriage shall take place hereafter and prior to or during the military or naval service of the soldier, sailor, officer, marine, or other person on account of whose service the pension is asked or claimed. This proviso shall not apply to or affect the widow of any soldier, sailor, marine, officer, or marine officer serving or who has served in the war between the United States and the Kingdom of Spain. *Act of Mar. 3, 1899 (30 Stat. 1379-1380), amending R. S. 4776.*

1854. Pensions for dependent relatives of a soldier.—If any person embraced within the provisions of sections forty-six hundred and ninety-two and forty-six hundred and ninety-three has died since the fourth day of March, eighteen hundred and sixty-one, or shall hereafter die, by reason of any wound, injury, casualty, or disease, which, under the conditions and limitations of such sections, would have entitled him to an invalid pension, and has not left or shall not leave, a widow or legitimate child, but has left or shall leave other relative or relatives who were dependent upon him for support, in whole or in part, at the date of his death, such relative or relatives shall be entitled, in the following order of precedence, to receive the same pension as such person would have been entitled to had he been totally disabled, to commence from the death of such person, namely: First, the mother; secondly, the father; thirdly, orphan brothers and sisters under sixteen years of age, who shall be pensioned jointly: *Provided,* That where orphan children of the same parent have different guardians, or a portion of them only are under guardianship, the share of the joint pension to which each ward shall be entitled shall be paid to the guardian of such ward: *Provided,* That if in any case said person shall have left father and mother who were dependent upon him, then, on the death of the mother,

the father shall become entitled to the pension, commencing from and after the death of the mother; and upon the death of the mother and father, or upon the death of the father and the remarriage of the mother, the dependent brothers and sisters under sixteen years of age shall jointly become entitled to such pension until they attain the age of sixteen years respectively, commencing from the death or remarriage of the party who had the prior right to the pension: *Provided*, That a mother shall be assumed to have been dependent upon her son within the meaning of this section if, at the date of his death, she had no other adequate means of support than the ordinary proceeds of her own manual labor and the contributions of said son or of any other persons not legally bound to aid in her support; and if, by actual contributions, or in any other way, the son had recognized his obligations to aid in support of his mother, or was by law bound to such support, and that a father or minor brother or sister shall, in like manner and under like conditions, be assumed to have been dependent, except that the income which was derived or derivable from his actual or possible manual labor shall be taken into account in estimating a father's means of independent support: *Provided further*, That the pension allowed to any person on account of his or her dependence, as hereinbefore provided, shall not be paid for any period during which it shall not be necessary as a means of adequate subsistence. *R. S. 4707.*

1855. Pensions for dependents of soldiers in Spanish, Philippine, and Boxer campaigns.—That from and after the passage of this Act if any volunteer officer or enlisted man who served ninety days or more in the Army, Navy, or Marine Corps of the United States, during the War with Spain or the Philippine insurrection, between April twenty-first, eighteen hundred and ninety-eight, and July fourth, nineteen hundred and two, inclusive, service to be computed from date of enlistment to date of discharge, or any officer or enlisted man of the Regular Establishment who rendered ninety days or more actual military or naval service in the United States Army, Navy, or Marine Corps in the War with Spain or the Philippine insurrection between April twenty-first, eighteen hundred and ninety-eight, and July fourth, nineteen hundred and two, inclusive, or as a participant in the Chinese Boxer rebellion campaign between June sixteenth, nineteen hundred, and October first, nineteen hundred, and who has been honorably discharged therefrom, has died or shall hereafter die leaving a widow without means of support other than her daily labor, and an actual net income not exceeding \$250 per year, or leaving a minor child or children under the age of sixteen years, such widow shall upon due proof of her husband's death, without proving his death to be the result of his Army or Navy service, be placed on the pension roll from the date of the filing of her application therefor under this Act, at the rate of \$12 per month during her widowhood, and shall also be paid \$2 per month for each child of such officer or enlisted man under sixteen years of age, and in case of the death or remarriage of the widow, leaving a child or children of such officer or enlisted man under the age of sixteen years, such pension shall be paid such child or children until the age of sixteen: *Provided*, That in case a minor child is insane, idiotic, or otherwise permanently helpless, the pension shall continue during the life of said child, or during the period of such disability, and shall commence from the date of application therefor after the passage of this Act: *Provided further*, That said widow shall have married said officer or enlisted man previous to the passage of this Act: *Provided, however*, That this Act shall not be so construed as to reduce any pension under any Act, public or private. *Sec. 1, act of July 16; 1918 (40 Stat. 903).*

1856. Pension not liable to attachment, etc.—No sum of money due, or to become due, to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the Pension-Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner. *R. S. 4747.*

Notes of Decisions.

Construction and operation in general.—The pension money is designed in part to enable the pensioner to support his wife and family, and the statute should not be strained to enable him to avoid this duty. *Tully v. Tully* (1893), 34 N. E. 79, 159 Mass. 91, 93.

The words in the act of Congress "shall inure to his own benefit" mean that the pensioner may use the money in any manner he may see proper, for his own benefit and to secure the comfort of his family, free from attacks of creditors. *Holmes v. Tallada* (1889), 17 Atl. 238, 125 Pa. 133, 136, 3 L. R. A. 219, 11 Am. St. Rep. 880.

When the defendant gave the pension check to his wife it certainly retained its distinctive character as a pension, within the rule of *Adams v. Newell & Tr.* (1830), 8 Vt. 190. It was said in that case that, a pension being a gratuity from the Government and intended for the support and comfort of the pensioner, the statute should be liberally construed. *Bullard v. Goodno* (1901), 50 Atl. 544, 73 Vt. 88, 91.

The words of the statute "shall inure wholly to the benefit of such pensioner" relate to the words "due, or to become due," and have no force after the public obligation has been discharged by delivery of the money to the pensioner or his agent. *In re Ferguson's Estate* (1909), 123 N. W. 123, 140 Wis. 583, 17 Ann. Cas. 1189.

"Money due or to become due"—Exemption.—The words "due, or to become due," in the statute, were doubtless employed to render it certain that the benefit of the statutory exemption was intended for pensioners to whom pensions had already been granted, as well as for those to whom pensions should be granted after the statute was enacted. *Folschow v. Werner* (1881), 7 N. W. 911, 51 Wis. 85, 88.

Pension money is only exempt from claims of a pensioner's creditor while it is "due, or to become due, to any pensioner." *In re Ferguson's Estate* (1909), 123 N. W. 123, 140 Wis. 583, 17 Ann. Cas. 1189.

This section does not purport to protect pension money after it has inured wholly to the benefit of the pensioner, but to protect it while in the pension office, or in the

hands of its agents or officers, and while it is in the course of transmission to the pensioner. *McIntosh v. Aubrey* (1902), 22 Sup. Ct. 561, 185 U. S. 122, 46 L. Ed. 834; *In re Stout* (D. C. 1900), 109 Fed. 794; *Price v. Society for Savings* (1904), 30 Atl. 139, 64 Conn. 362, 42 Am. St. Rep. 198; *McFarland v. Fish* (1890), 12 S. E. 548, 34 W. Va. 548; *Bank of Kingwood v. Murdock* (1900), 37 S. E. 548, 48 W. Va. 301. Nor does it extend to property purchased with money awarded the pensioner. *Curtis v. Helton* (1900), 59 S. W. 745, 109 Ky. 493, 95 Am. St. Rep. 388; *Kellogg v. Walte* (Mass. 1886), 12 Allen, 529. But see *Crow v. Brown* (1890), 81 Iowa, 344, 46 N. W. 993, 11 L. R. A. 110, 25 Am. St. Rep. 501, holding that property purchased by a pensioner with his pension money is exempt from the payment of his debts; *Marquardt & Sons v. Mason* (1893), 87 Iowa, 136, 138, 54 N. W. 72. And see *Folschow v. Werner* (1881), 51 Wis. 85, 88, holding that specific money received by the pensioner from the Government in payment of a pension granted to him can not be reached by a creditor and applied to the payment of the debt of the pensioner by any judicial process.

Money being transmitted.—Pension money paid to the guardian of an insane pensioner, and by him loaned, is in process of transmission to the pensioner, and still under control of the Federal Government, and so is exempt from taxation, as a pension. *Manning v. Spry* (1903), 96 N. W. 873, 121 Iowa, 191.

Bankruptcy.—Money received from the United States as a pension, and remaining unchanged in the pensioner's hands at the time of filing his petition in bankruptcy, is exempt from liability for his debts, and does not pass to his trustee in bankruptcy as assets of his estate. *In re Bean* (D. C. 1900), 100 Fed. 262.

The words "inure wholly to the benefit of such pensioner" mean only that the pension funds should be protected until they come safely into the hands of the pensioner, after which they are liable for his debts. Hence pension money, in the hands of a bankrupt at the time of the adjudication, neither invested nor mingled

with other funds, was not exempt. In re Jones (D. C. 1909), 166 Fed. 337.

Interest on pension money.—Interest received on pension money loaned out by a pensioner is not exempt from taxation. Rednar v. Carroll (1908), 116 N. W. 315, 138 Iowa, 338.

Pension and alimony.—The statute does not render it error to consider a pension as a part of the pensioner's financial resources, in determining the amount of alimony he should be required to pay.

Wheeler v. Wheeler (N. J. 1912), 94 Atl. 85; Bailey v. Bailey (1904), 56 Atl. 1014, 76 Vt. 264, 65 L. R. A. 332, 104 Am. St. Rep. 935.

State exemption law.—On application by judgment creditor of bankrupt for leave to procure execution against pension, bankruptcy court held bound to consider the State law claimed to authorize such execution. In re Hoag (D. C. 1915), 227 Fed. 480.

1857. Pledge or transfer of pensions.—Any pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest in any pension which has been, or may hereafter be, granted, shall be void and of no effect, and any person who shall pledge, or receive as a pledge, mortgage, sale, assignment or transfer of any right, claim, or interest in any pension, or pension certificate, which has been, or may hereafter be granted or issued, or who shall hold the same as collateral security for any debt, or promise, or upon any pretext of such security, or promise, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one hundred dollars and the costs of the prosecution: * * * *R. S. 4745, as amended by sec. 2, act of Feb. 28, 1883 (22 Stat. 432).*

Notes of Decisions.

Transfer of pension.—The gift of a check for pension money is not void. Farmer v. Turner (1884), 64 Iowa, 690, 21 N. W. 140.

A verbal promise by a pension claimant to pay a debt out of his pension money is not a "pledge, mortgage, assignment, transfer, or sale," under this section. Crane v. Inhabitants of Linneus (1885), 77 Me. 59.

This section refers only to such transfers as are made, if all the moneys have been reduced to the possession of the pensioner. Omans v. Beeman (N. Y. Co. Ct. 1910), 124 N. Y. Supp. 166, 66 Misc. Rep. 625.

Rules of soldiers' homes.—Rules of soldiers' homes held not violative of this sec-

tion. Ball v. Evans (1896), 68 N. W. 435, 98 Iowa, 708.

The rule prescribed for admission to the soldiers' and sailors' home established by act Pa. June 3, 1885 (P. L. 62), as amended by act of May 4, 1893 (P. L. 30), that a member of the home who is a pensioner shall pay over to officers of the home half the amount which he draws in excess of \$4, is not in conflict with this section. Brooks v. Hastings (1899), 43 A. 1075, 192 Pa. St. 378, 44 W. N. C. 323. See, also, O'Donohue v. New Jersey Home for Disabled Soldiers (1900), 47 Atl. 452, 65 N. J. Law, 484.

1858. Compensation for death or disability authorized.—That for death or disability resulting from personal injury suffered or disease contracted in the line of duty, by any commissioned officer or enlisted man, or by any member of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) when employed in the active service under the War Department or Navy Department, the United States shall pay compensation as hereinafter provided; but no compensation shall be paid if the injury or disease has been caused by his own willful misconduct: *Provided*, That for the purposes of this section said officer, enlisted man, or other member shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service: *Provided further*, That this section, as amended, shall be deemed to become effective as of April 6, 1917. *Sec. 300, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 405), as amended by sec. 10a, act of Dec. 24, 1919 (41 Stat. 373).*

Act of June 25, 1918 (40 Stat. 611) amending the act of Oct. 6, 1917 (40 Stat. 406), provided that this section should become effective as of Oct 6, 1917.

1859. Compensation for death or disability of members of Army Nurse Corps.— * * * Compensation because of disability or death of members of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) shall be in lieu of any compensation for such disability or death under the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," approved September seventh, nineteen hundred and sixteen. *Sec. 312, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 408), as amended by sec. 17, act of June 25, 1918 (40 Stat. 613).*

1860. Compensation of death or disability of members of the Coast and Geodetic Survey.— * * * While actually employed in active service under direct orders of the War Department or of the Navy Department members of the Coast and Geodetic Survey shall receive the benefit of all provisions of laws relating to disability incurred in line of duty or loss of life. * * * *Sec. 16, act of May 22, 1917 (40 Stat. 88).*

1861. Compensation for death or disability of members of the Public Health Service.—That when officers of the United States Public Health Service are serving on Coast Guard vessels in time of war, or are detailed in time of war for duty with the Army or Navy in accordance with law, they shall be entitled to pensions for themselves and widows and children, if any, as are now provided for officers of corresponding grade and length of service of the Coast Guard, Army or Navy, as the case may be, and shall be subject to the laws prescribed for the government of the service to which they are respectively detailed. *Joint Res. 9, July 9, 1917 (40 Stat. 242).*

1862. Commissioned officer defined.—The term "commissioned officer" includes a warrant officer, but includes only an officer in active service in the military or naval forces of the United States. *Sec. 22 (6), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 401).*

1863. Man and enlisted man defined.—The terms "man" and "enlisted man" mean a person, whether male or female, and whether enlisted, enrolled, or drafted into active service in the military or naval forces of the United States, and includes noncommissioned and petty officers, and members of training camps authorized by law. *Sec. 22 (7), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 401).*

1864. Enlistment defined.—The term "enlistment" includes voluntary enlistment, draft, and enrollment in active service in the military or naval forces of the United States. *Sec. 22 (8), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 401).*

1865. Injury defined.—The term "injury" includes disease. *Sec. 22 (10), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 402).*

1866. Pay defined.—The term "pay" means the pay for service in the United States according to grade and length of service, excluding all allowances. *Sec. 22 (11), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 402).*

1867. Military forces defined.—The term "military or naval forces" means the Army, the Navy, the Marine Corps, the Coast Guard, the Naval Reserves, the National Naval Volunteers, and any other branch of the United States service while serving pursuant to law with the Army or the Navy. *Sec. 22 (12), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 402).*

1868. Compensation for partial and temporary disability.—If and while the disability is rated as partial and temporary, the monthly compensation shall be a percentage of the compensation that would be payable for his total and temporary disability, equal to the degree of the reduction in earning capacity resulting from the disability, but no compensation shall be payable for a reduction in earning capacity rated at less than 10 per centum. *Sec. 302 (2), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 406), as amended by sec. 11, act of Dec. 24, 1919 (41 Stat. 373).*

1869. Compensation for partial and permanent disability.—If and while the disability is rated as partial and permanent, the monthly compensation shall be a percentage of the compensation that would be payable for his total and permanent disability equal to the degree of the reduction in earning capacity resulting from the disability, but no compensation shall be payable for a reduction in earning capacity rated at less than 10 per centum. * * * *Sec. 302 (4), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 406), as amended by sec. 11, act of Dec. 24, 1919 (41 Stat. 373).*

1870. Compensation for total and temporary disability.—That if disability results from the injury—

(1) If and while the disability is rated as total and temporary, the monthly compensation shall be the following amounts:

(a) If the disabled person has neither wife nor child living, \$90.

(b) If he has a wife but no child living, \$90.

(c) If he has a wife and one child living, \$95.

(d) If he has a wife and two or more children living, \$100.

(e) If he has no wife but one child living, \$90, with \$5 for each additional child.

(f) If he has a mother or father, either or both dependent on him for support, then, in addition to the above amounts, \$10 for each parent so dependent. *Sec. 302 (1), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 406), as amended by sec 11, act of Dec. 24, 1919 (41 Stat. 373).*

As originally enacted, this section was as follows:

(1) If and while the disability is total, the monthly compensation shall be the following amounts:

(a) If the disabled person has neither wife nor child living, \$30;

(b) If he has a wife but no child living, \$45;

(c) If he has a wife and one child living, \$55;

(d) If he has a wife and two children living, \$65;

(e) If he has a wife and three or more children living, \$75;

(f) If he has no wife but one child living, \$40; with \$10 for each additional child up to two;

(g) If he has a mother or father, either or both dependent on him for support, then in addition to the above amounts, \$10 for each.

1871. Compensation for total and permanent disability.—If and while the disability is rated as total and permanent, the rate of compensation shall be \$100 per month: *Provided, however,* That the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability: *Provided further,* That for double, total, permanent disability the rate of compensation shall be \$200 per month. *Sec. 302 (3), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1914 (40 Stat. 406), as amended by sec. 11, act of Dec. 24, 1919 (41 Stat. 373).*

1872. Compensation for disability requiring an attendant.—If the disabled person is so helpless as to be in constant need of a nurse or attendant, such addi-

tional sum shall be paid, but not exceeding \$20 per month, as the director may deem reasonable. *Sec. 302 (5), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 406), as amended by sec. 11, act of Dec. 24, 1919 (41 Stat. 374).*

Sec. 302 (1) (h), of the war-risk insurance act as amended by sec. 12, act of June 25, 1918 (40 Stat. 612), provided as follows:

"If he is totally disabled and in addition so helpless as to be in constant need of a nurse or attendant, such additional sum shall be paid, but not exceeding \$20 per month, as the director may deem reasonable: Provided, however, That for the loss of both feet or both hands or both eyes, or for becoming totally blind or becoming helpless and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be \$100 per month: Provided further, That where the rate of compensation is \$100 per month, no allowance shall be made for a nurse or attendant." These amounts are the same as provided by the original enactment of the act of Oct. 6, 1917 (40 Stat. 406).

1873. Schedule of earning capacities.—A schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries of a permanent nature shall be adopted and applied by the bureau. Ratings may be as high as 100 per centum. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of a permanent injury. The bureau in adopting the schedule of ratings of reduction in earning capacity shall consider the impairment in ability to secure employment which results from such injuries. The bureau shall from time to time readjust this schedule of ratings in accordance with actual experience. *Sec. 302 (4), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 406), as amended by sec. 11, act of Dec. 24, 1919 (41 Stat. 373).*

As originally enacted subdivision (4) was as follows:

"(4) The amount of each monthly payment shall be determined according to the family conditions then existing." This was amended by sec. 13, act of June 25, 1918 (40 Stat. 613), which substituted for the last two words "then existing" the words "existing on the first day of the month." That was apparently superseded by the above section.

1874. Military control continuous prior to discharge.— * * * *Provided, That nothing in this Act shall be construed to affect the necessary military control over any member of the military or naval establishments before he shall have been discharged from the military or naval service. Sec. 302 (6), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 406), as amended by sec. 11, act of Dec. 24, 1919 (41 Stat. 374).*

1875. Review of awards of compensation.—That upon its own motion or upon application the bureau may at any time review an award, and, in accordance with the facts found upon such review, may end, diminish, or increase the compensation previously awarded, or, if compensation has been refused or discontinued, may award compensation. *Sec. 305, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 407).*

1876. Medical examination of disabled persons.—That every person applying for or in receipt of compensation for disability under the provisions of this article shall, as frequently and at such times and places as may be reasonably required, submit himself to examination by a medical officer of the United States or by a duly qualified physician designated or approved by the director. He may have a duly qualified physician designated and paid by him present to participate in such examination. For all examinations he shall, in the dis-

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cretion of the director, be paid his reasonable traveling and other expenses and also loss of wages incurred in order to submit to such examination. * * * *Sec. 303, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 406).*

1877. Compensation barred by refusal of medical examination.—* * * If he refuses to submit himself for, or in any way obstructs, any examination, his right to claim compensation under this article shall be suspended until such refusal or obstruction ceases. No compensation shall be payable while such refusal or obstruction continues, and no compensation shall be payable for the intervening period.

Every person in receipt of compensation for disability shall submit to any reasonable medical or surgical treatment furnished by the bureau whenever requested by the bureau; and the consequences of unreasonable refusal to submit to any such treatment shall not be deemed to result from the injury compensated for. *Sec. 303, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 407).*

1878. No compensation to persons receiving service or retirement pay.—That compensation under this article shall not be paid while the person is in receipt of service or retirement pay. * * * *Sec. 312, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 408), as amended by sec. 17, act of June 25, 1918 (40 Stat. 613).*

1879. Surrender of other gratuities prerequisite to award of compensation.—* * * That section 302 of the War Risk Insurance Act as amended shall be deemed to be in effect as of April 6, 1917: *Provided*, That any person who is now receiving a gratuity or pension under existing law shall not receive compensation under this Act unless he shall first surrender all claim to such gratuity or pension. *Sec. 302 (10), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 408), as amended by sec. 11, act of Dec. 24, 1919 (41 Stat. 574).*

1880. Compensation barred by dismissal or dishonorable discharge.—* * * A dismissal or dishonorable or bad conduct discharge from the service shall bar and terminate all right to any compensation under the provisions of this article. *Sec. 308, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 407).*

1881. Compensation depends on date of death or disability.—That no compensation shall be payable for death or disability which does not occur prior to or within one year after discharge or resignation from the service, except that where, after a medical examination made pursuant to regulations, at the time of discharge or resignation from the service; or within such reasonable time thereafter, not exceeding one year, as may be allowed by regulations, a certificate has been obtained from the director to the effect that the injured person at the time of his discharge or resignation was suffering from injury likely to result in death or disability, compensation shall be payable for death or disability, whenever occurring, proximately resulting from such injury. *Sec. 306, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 407).*

1882. Award of compensation or insurance where death occurred before enrollment for active service.—That if after induction by the local draft board, but before being accepted and enrolled for active service, the person died or became disabled as a result of disease contracted or injury suffered in the line of duty and not due to his own willful misconduct involving moral turpitude, or as a

result of the aggravation, in the line of duty and not because of his own willful misconduct involving moral turpitude, of an existing disease or injury, he or those entitled thereto shall receive the benefits of compensation payable under Article III: * * * *Sec. 31, added to the act of Sept. 2, 1914, by sec. 7, act of Dec. 24, 1919 (41 Stat. 372).*

1883. Unpaid monthly installments of compensation, etc., payable to the personal representative of a deceased person.—That the amount of the monthly installments of allotment and family allowance, compensation, or yearly renewable term insurance which has become payable under the provisions of the War Risk Insurance Act but which has not been paid prior to the death of the person entitled to receive the same may be payable to the personal representatives of the deceased person. *Sec. 19, act of Dec. 24, 1919 (41 Stat. 376-377).*

1884. Apportionment of compensation between a disabled soldier and his family.—Where the disabled person and his wife are not living together, or where the children are not in the custody of the disabled person the amount of the compensation shall be apportioned as may be prescribed by regulations. *Sec. 302 (7), added to the act of Sept. 2, 1914, by sec. 14, act of June 25, 1918 (40 Stat. 613), as amended by sec. 11, act of Dec. 24, 1919 (41 Stat. 374).*

The term "wife" as used in this section shall include "husband" if the husband is dependent upon the wife for support. *Sec. 302 (8), added to the act of Sept. 2, 1914, by sec. 14, act of June 25, 1918 (40 Stat. 613), as amended by sec. 11, act of Dec. 24, 1919 (41 Stat. 374).*

1885. Compensation to dependents barred by a death sentence.—That no compensation shall be payable for death inflicted as a lawful punishment for a crime or military offense except when inflicted by the enemy. * * * *Sec. 308, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 407).*

1886. Official record of death prerequisite to the payment of compensation.—That compensation shall not be payable for death in the course of the service until the death be officially recorded in the department under which he may be serving. No compensation shall be payable for a period during which the man has been reported "missing" and a family allowance has been paid for him under the provisions of Article II. *Sec. 307, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 407).*

1887. Compensation of dependents of a deceased person allowed from April 6, 1917.—* * * That section 301 of the War Risk Insurance Act, as amended, shall be deemed to be in effect as of April 6, 1917: * * * *Sec. 10, act of Dec. 24, 1919 (41 Stat. 372).*

1888. Surrender of pension rights, etc., by dependents of a deceased soldier.—* * * *Provided, however,* That before compensation thereunder shall be paid there shall first be deducted from said sum so to be paid the amount of any payments such person may have received by way of gratuities or payments under pension laws in force and existence between April 6, 1917, and October 6, 1917. *Sec. 10, act of Dec. 24, 1919 (41 Stat. 372-373).*

1889. Compensation to the widow and children of a deceased soldier.—That if death results from injury—

If the deceased leaves a widow or child, * * * the monthly compensation shall be the following amounts:

- (a) If there is a widow but no child, \$25;
- (b) If there is a widow and one child, \$35;

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(c) If there is a widow and two children, \$42.50, with \$5 for each additional child up to two;

(d) If there is no widow, but one child, \$20;

(e) If there is no widow, but two children, \$30;

(f) If there is no widow, but three children, \$40, with \$5 for each additional child up to two; * * *

The payment of compensation to a widow shall continue until her death or remarriage.

The payment of compensation to or for a child shall continue until such child reaches the age of eighteen years or marries, or if such child be incapable, because of insanity, idiocy, or being otherwise permanently helpless, then during such incapacity. * * * *Sec. 301, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 405), as amended by sec. 11, act of June 25, 1918 (40 Stat. 611).*

The original act read as follows:

If death results from injury—

If the deceased leaves a widow or child, or if he leaves a widowed mother dependent upon him for support, the monthly compensation shall be the following amounts:

(a) For a widow alone, \$25.

(b) For a widow and one child, \$35.

(c) For a widow and two children, \$47.50, with \$5 for each additional child up to two.

(d) If there be no widow, then for one child, \$20.

(e) For two children, \$30.

(f) For three children, \$40, with \$5 for each additional child up to two.

1890. Apportionment of compensation between a widow and the children.—

* * * As between the widow and the children not in her custody, and as between children, the amount of the compensation shall be apportioned as may be prescribed by regulation. * * * *Sec. 301, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 405), as amended by sec. 11, act of June 25, 1918 (40 Stat. 612).*

1891. Widow defined.—* * * The term "widow" as used in this section shall not include one who shall have married the deceased later than ten years after the time of injury, and shall include a widower, whenever his condition is such that, if the deceased person were living, he would have been dependent upon her for support. *Sec. 301, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 406), as amended by sec. 11, act of June 25, 1918 (40 Stat. 612).*

The provision as to widower was added by this amendment.

1892. Evidence of marriage.—That for the purpose of this amendatory Act the marriage of the claimant to the person on account of whom the claim is made shall be shown—

(1) By a duly verified copy of a public or church record; or

(2) By the affidavit of the clergyman or magistrate who officiated; or

(3) By the testimony of two or more eyewitnesses to the ceremony; or

(4) By a duly verified copy of the church record of baptism of the children; or

(5) By the testimony of two or more witnesses who know that the parties lived together as husband and wife, and were recognized as such, and who shall state how long, within their knowledge, such relation continued: *Provided*, That marriages, except such as are mentioned in section forty-seven hundred and five of the Revised Statutes, shall be proven in compensation or insurance cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to com-

pensation or insurance accrued; and the open and notorious illicit cohabitation of a widow who is a claimant shall operate to terminate her right to compensation or insurance from the commencement of such cohabitation: * * * *Sec. 22, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 400).*

1893. Child defined.—In Articles II, III, and IV of this Act unless the context otherwise requires—

(1) The term "child" includes—

(a) A legitimate child. *Sec. 22 (1) (a), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 401).*

(b) A child legally adopted. *Sec. 22 (1) (b), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 401), as amended by sec. 2, act of Dec. 24, 1919 (41 Stat. 371).*

(c) A stepchild, if a member of the man's household. *Sec. 22 (1) (c), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 401).*

(d) An illegitimate child, but, as to the father only, if acknowledged in writing signed by him, or if he has been judicially ordered or decreed to contribute to such child's support, or has been judicially decreed to be the putative father of such child. *Sec. 22 (1) (d), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 401), as amended by sec. 3, act of Dec. 24, 1919 (41 Stat. 371).*

Paragraph (b) of the second subdivision (1), sec. 22, act of Oct. 6, 1917 (40 Stat. 401), was as follows:

"(b) A child legally adopted more than six months before the enactment of this amendatory Act or before enlistment or entrance into or employment in active service in the military or naval forces of the United States, whichever of these dates is the later."

Paragraph (d) of the second subdivision (1) of sec. 22 was as follows:

"(d) An illegitimate child, but, as to the father, only, if acknowledged by instrument in writing signed by him, or if he has been judicially ordered or decreed to contribute to such child's support, and if such child, if born after December thirty-first, nineteen hundred and seventeen, shall have been born in the United States, or in its insular possessions."

1894. Age limit of children and grandchildren.—Except as used in section four hundred and one and in section four hundred and two the terms "child" and "grandchild" are limited to unmarried persons either (a) under eighteen years of age, or (b) of any age, if insane, idiotic, or otherwise permanently helpless. *Sec. 22 (3), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 401).*

1895. Claims of minors and mentally incompetent persons.—That when, by the terms of this amendatory Act, any payment is to be made to a minor, other than a person in the military or naval forces of the United States, or to a person mentally incompetent, such payment shall be made to the person who is constituted guardian or curator by the laws of the State or residence of claimant, or is otherwise legally vested with responsibility or care of the claimant. *Sec. 23, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 402).*

If any person entitled to receive payments under this Act shall be an inmate of any asylum or hospital for the insane maintained by the United States, or by any of the several States or Territories of the United States, or any political subdivision thereof, and no guardian or curator of the property of such person shall have been appointed by competent legal authority, the director, if satisfied after due investigation that any such person is mentally incompe-

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tent, may order that all moneys payable to him or her under this Act shall be held in the Treasury of the United States to the credit of such person. All funds so held shall be disbursed under the order of the director and subject to his discretion, either to the chief executive officer of the asylum or hospital in which such person is an inmate, to be used by such officer for the maintenance and comfort of such inmate, subject to the duty to account to the Bureau of War Risk Insurance and to repay any surplus at any time remaining in his hands in accordance with regulations to be prescribed by the director; or to the wife (or dependent husband if the inmate is a woman), minor children, and dependent parents of such inmate, in such amounts as the director shall find necessary for their support and maintenance, in the order named; or, if at any time such inmate shall be found to be mentally competent, or shall die, or a guardian or curator of his or her estate be appointed, any balance remaining to the credit of such inmate shall be paid to such inmate, if mentally competent, and otherwise to his or her guardian, curator or personal representatives. *Sec. 5, act of Dec. 24, 1919 (41 Stat. 371), amending sec. 23, act of Sept. 2, 1914 (40 Stat. 402).*

1898. Compensation to the parents of a deceased soldier.—That if death results from injury—

* * * or if he leaves a mother or father either or both dependent upon him for support, the monthly compensation shall be the following amounts:
* * *

(g) If there is a dependent mother (or dependent father), \$20, or both, \$30. The amount payable under this subdivision shall not exceed the difference between the total amount payable to the widow and children and the sum of \$75. * * *

Such compensation shall be payable whether the dependency of the father or mother or both arises before or after the death of the person, but no compensation shall be payable if the dependency arises more than five years after the death of the person. *Sec. 301, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 405), as amended by sec. 11, act of June 25, 1918 (40 Stat. 611, 612).*

That where section three hundred and one of said Act is amended by striking out the provisions that a mother is entitled to compensation only when she is widowed and substitute provisions are included to the effect that compensation is payable to a dependent mother or dependent father, such substitute provisions shall be deemed to be in effect as of October sixth, nineteen hundred and seventeen. *Sec. 15, act of June 25, 1918 (40 Stat. 613).*

1897. Dependent parent compensated for the death of but one child.— * * * This compensation shall be payable for the death of but one child, and no compensation for the death of a child shall be payable if the dependent mother is in receipt of compensation under the provisions of this article for the death of her husband. * * * *Sec. 301(g), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 405), as amended by sec. 11, act of June 25, 1918 (40 Stat. 612).*

In this amendment, the words "the dependent mother" are substituted for "such widowed mother."

1898. Parent defined.—The term "parent" includes a father, mother, grandfather, grandmother, father through adoption, mother through adoption, stepfather, and stepmother, either of the person in the service or of the spouse.

Sec. 22 (4), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 401), as amended by sec. 1, act of June 25, 1918 (40 Stat. 609).

The terms "father" and "mother" include stepfathers and stepmothers, fathers and mothers through adoption, and persons who have stood in loco parentis to a member of the military or naval forces at any time prior to his enlistment or induction for a period of not less than one year: *Provided*, That this subdivision shall be deemed to be in effect as of October 6, 1917. *Sec. 22 (4a), added to the act of Sept. 2, 1914, by sec. 4, act of Dec. 24, 1919 (41 Stat. 371).*

According to the original act, the term "parent" included a father, mother, grandfather, grandmother, stepfather, and stepmother, either of the person in the service or of the spouse.

1899. Compensation apportioned among surviving beneficiaries after death of one beneficiary.— * * * Whenever the compensation payable to or for the benefit of any person under the provisions of this section is terminated by the happening of the contingency upon which it is limited, the compensation thereafter for the remaining beneficiary or beneficiaries, if any, shall be the amount which would have been payable to them if they had been the sole original beneficiaries. * * * *Sec. 301, act of Oct. 6, 1917 (40 Stat. 405), as amended by sec. 11, act of June 25, 1918 (40 Stat. 612).*

1900. Payments of compensation and insurance not assignable, nor subject to debts, nor taxable.—That the allotments and family allowances, compensation, and insurance payable under Articles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Articles II, III, or IV; and shall be exempt from all taxation: *Provided*, That such allotments and family allowances, compensation, and insurance shall be subject to any claims which the United States may have, under Articles II, III, and IV, against the person on whose account the allotments and family allowances, compensation, or insurance is payable. *Sec. 28, added to the act of Sept. 2, 1914, by sec. 2, act of June 25, 1918 (40 Stat. 609).*

1901. Time of filing claim for compensation.—That no compensation shall be payable unless a claim therefor be filed, in case of disability, within five years after discharge or resignation from the service, or, in case of death during the service, within five years after such death is officially recorded in the department under which he may be serving: *Provided, however*, That where compensation is payable for death or disability occurring after discharge or resignation from the service, claim must be made within five years after such death or the beginning of such disability.

The time herein provided may be extended by the director not to exceed one year for good cause shown. If at the time that any right accrues to any person under the provisions of this article, such person is a minor, or is of unsound mind or physically unable to make a claim, the time herein provided shall not begin to run until such disability ceases. *Sec. 309, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 407).*

1902. Limitation of time as to back payments of compensation.—That no compensation shall be payable for any period more than two years prior to the date of claim therefor, nor shall increased compensation be awarded to revert back more than one year prior to the date of claim therefor. *Sec. 310, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 408).*

1903. Fees for preparing papers for claims for compensation, war risk insurance, etc.—* * * *Provided, however,* That payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed \$3 in any one case: * * * *Sec. 13, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 399), as amended by sec. 1, act of May 20, 1918 (40 Stat. 555).*

1904. Presentation by attorney or agent of a claim for compensation, war risk insurance, etc.—* * * *And provided further,* That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid. * * * *Sec. 13, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 399), as amended by sec. 1, act of May 20, 1918 (40 Stat. 555).*

1905. Punishment for charging unauthorized fees.—* * * Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than \$500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment. *Sec. 13, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 399), as amended by sec. 1, act of May 20, 1918 (40 Stat. 556).*

1906. Perjury in connection with claims for compensation, war risk insurance, etc.—That whoever in any claim for family allowance, compensation, or insurance, or in any document required by this Act or by regulation made under this Act, makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years, or both. *Sec. 25, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 402).*

1907. Fraudulent acceptance of family allowance, compensation, allotment of pay or insurance.—That if any person entitled to payment of family allowance or compensation under this Act, whose right to such payment under this Act ceases upon the happening of any contingency, thereafter fraudulently accepts any such payment, he shall be punished by a fine of not more than \$2,000, or by imprisonment for not more than one year, or both. *Sec. 26, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 402).*

That whoever shall obtain or receive any money, check, allotment, family allowance, compensation, or insurance under Articles II, III, or IV of this Act, without being entitled thereto, with intent to defraud the United States or any person in the military or naval forces of the United States, shall be punished by a fine of not more than \$2,000, or by imprisonment for not more than one

year, or both. *Sec. 27, added to the act of Sept. 2, 1914, by sec. 2, act of June 25, 1918 (40 Stat. 609).*

1908. Assignment to United States by recipient of compensation of damage claim against third party.—That if an injury or death for which compensation is payable under this article is caused under circumstances creating a legal liability upon some person other than the United States or the enemy to pay damages therefor, the director, as a condition to payment of compensation by the United States, may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person, or if it appears to be for the best interests of the beneficiary the director may require him to prosecute the said action in his own name, subject to regulations. The director may require such assignment or prosecution at any time after the injury or death, and the failure on the part of the beneficiary to so assign or to prosecute said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned to the United States may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be placed to the credit of the military and naval compensation appropriation. If the amount placed to the credit of such appropriation in such case is in excess of the amount of the award of compensation, if any, such excess shall be paid to the beneficiary after any compensation award for the same injury or death is made. * * * *Sec. 313 (1), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 408), as amended by sec. 18, act of June 25, 1918 (40 Stat. 613).*

As originally enacted this section was as follows:

"That if an injury or death for which compensation is payable under this amendatory act is caused under circumstances creating a legal liability upon some person other than the United States or the enemy to pay damages therefor, the director, as a condition to payment of compensation by the United States, shall require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person. The cause of action so assigned to the United States may be prosecuted or compromised by the director and any money realized thereon shall be placed to the credit of the compensation fund."

1909. Assignment of damage claims by conditional beneficiaries.—If an injury or death for which compensation may be payable under this article is caused under circumstances creating a legal liability upon some person, other than the United States or the enemy, to pay damages therefor, then, in order to preserve the right of action, the director may require the conditional beneficiary at any time after the injury or death, to assign such right of action to the United States, or, if it appears to be for the best interests of such conditional beneficiary, to prosecute the said cause of action in his own name, subject to regulations. The failure on the part of the beneficiary to so assign or to prosecute the said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be paid to such beneficiary, and be credited upon any future compensation which may become payable to such beneficiary by the United States on account of the same injury

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or death. *Sec. 313 (2), added to the act of Sept. 2, 1914, by sec. 18, act of June 25, 1918 (40 Stat. 614).*

See note to the preceding section.

1910. Damages recovered through the United States to be credited upon compensation.—* * * If a beneficiary or conditional beneficiary shall have recovered, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such money or other property so recovered shall be credited upon any compensation payable, or which may become payable, to such beneficiary, or conditional beneficiary by the United States on account of the same injury or death. *Sec. 313 (1), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 408), as amended by sec. 18, act of June 25, 1918 (40 Stat. 614).*

The bureau shall make all necessary regulations for carrying out the purposes of this section. For the purposes of computation only under this section the total amount of compensation due any beneficiary shall be deemed to be equivalent to a lump sum equal to the present value of all future payments of compensation computed as of the date of the award of compensation at four per centum, true discount, compounded annually. The probability of the beneficiary's death before the expiration of the period during which he is entitled to compensation shall be determined according to the American Experience Table of Mortality.

A conditional beneficiary is any person who may become entitled to compensation under this article on or after the death of the injured person. * * * *Sec. 313 (3), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 408), as amended by sec. 18, act of June 25, 1918 (40 Stat. 614).*

CHAPTER 29.

WAR RISK INSURANCE.

Soldiers and nurses entitled to, 1911.

Applications:

Time limit, 1912.

Made before enrollment, 1913.

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Where designated beneficiary has died, 1923.

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Contracts of insurance, 1927.

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Calculations based on American Experience

Tables of Mortality, 1929.

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Bureau of War Risk Insurance:

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Assisted by surgeons of the Army, 1938.

Compelling testimony, 1939.

Fees and mileage of witnesses, 1940.

Assistance to policy holders, 1941.

Record of insurance, 1942.

War Risk insurance act, 1943.

1911. Soldiers and nurses entitled to insurance.—That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of \$500, and not less than \$1,000 or more than \$10,000, upon the payment of the premiums as hereinafter provided. *Sec. 400, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 409).*

Notes of Decisions.

Application for insurance.—The privilege of applying for insurance under section 400 of the amendment of Oct. 6, 1917, to the war-risk insurance act (40 Stat. 409), is

confined to persons in the military or naval service of the United States, including of course their duly authorized representatives. 81 Op. Atty. Gen. 188.

1912. Time limit for making application for insurance.—That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, except that those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred and twenty days thereafter and while in such service: * * * *Sec. 401, added to the act of Sept. 2, 1914,*

by sec. 2, act of Oct. 6, 1917 (40 Stat. 409), as amended by sec. 12, act of Dec. 24, 1919 (41 Stat. 374).

Notes of Decisions.

Total disability occurring before application.—Under a provision of the war-risk insurance act of Oct. 6, 1917 (40 Stat. 409), an enlisted man, who was in the active service at the time of the publication of the terms and conditions of the contract of insurance covering total permanent dis-

ability, and who sustained such disability before the expiration of 120 days from such publication, without having applied for such insurance, is entitled to be treated as having been automatically insured and to receive \$25 per month. 31 Op. Atty. Gen. 534.

1913. Application for insurance before enrollment for active service.—* * * *Provided*, That any insurance application made by a person after induction by the local draft board but before being accepted and enrolled for active service shall be deemed valid. *Sec. 31, added to the act of Sept. 2, 1914, by sec. 7, act of Dec. 24, 1919 (41 Stat. 372).*

1914. Automatic application for insurance.—* * * *Provided*, That any person in the active service on or after the 6th day of April, 1917, and before the 11th day of November, 1918, who while in such active service made application for insurance after the expiration of more than one hundred and twenty days after October 15, 1917, or more than one hundred and twenty days after entrance into or employment in the active service, and whose application was accepted and a policy issued thereon, and from whom premiums were collected, and who becomes or had become totally and permanently disabled, or dies or has died, shall be deemed to have made legal application for such insurance and the policy issued on such application shall be valid. Any person in the active service on or after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before the expiration of one hundred and twenty days after October 15, 1917, or one hundred and twenty days after entrance into or employment in the active service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of \$25 each; and any person inducted into the service by a local draft board after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before being accepted and enrolled for active military or naval service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of \$25 each. * * * *Sec. 401, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 409), as amended by sec. 12, act of Dec. 24, 1919 (41 Stat. 375).*

This section as amended apparently superseded Joint Resolution No. 22, act of Feb. 12, 1918 (40 Stat. 438), which was as follows:

"That the time within which application for insurance may be made as set forth in section four hundred and one of the Act entitled 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September second, nineteen hundred and fourteen, as amended by the Act approved October sixth, nineteen hundred and seventeen, is hereby extended, with respect to every person in the active war service as to whom the time for making application would expire before the twelfth day of April, nineteen hundred and eighteen, so that every such person may make application for insurance up to and including the said twelfth day of April, nineteen hundred and eighteen: *Provided*, That nothing herein shall be construed to effect an extension of the automatic insurance provided for in the said section four hundred and one beyond the twelfth day of February, nineteen hundred and eighteen."

1915. Automatic insurance granted to personnel of the "Cyclops."—* * * *Provided further*, That each officer and enlisted man attached to the United States ship Cyclops on the 4th day of March, 1918, and every officer and enlisted man who on said date was a passenger on said vessel shall be deemed to have been granted insurance in the sum of \$5,000 permitted under the War Risk Insurance Act. *Sec. 401, added to act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 409), as amended by sec. 12, act of Dec. 24, 1919 (41 Stat. 375).*

1916. Insurance of prisoners of war taken before April 12, 1918.—That insurance under the Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September second, nineteen hundred and fourteen, as amended by the Act approved October sixth, nineteen hundred and seventeen, shall be granted by the Bureau of War Risk Insurance on application made by the person to be insured or, subject to such regulations as the bureau may prescribe, by any person within the permitted class as specified in section four hundred and two of said Act: *Provided*, That the person to be insured has been taken a prisoner of war before April twelfth, nineteen hundred and eighteen: *And provided further*, That no one but the insured may designate a beneficiary, and nothing in this resolution shall be deemed to change or affect the permitted class of beneficiaries or impose any obligation on the insured against his will. *Joint Res. 27, April 2, 1918 (40 Stat. 502).*

1917. Insurance terminated by discharge or dismissal.—That the discharge or dismissal of any person from the military or naval forces on the ground that he is an enemy alien, conscientious objector, or a deserter, or as guilty of mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct shall terminate any insurance granted on the life of such person under the provisions of Article IV, and shall bar all rights to any compensation under Article III or any insurance under Article IV. *Sec. 29, added to act of Sept. 2, 1914, by sec. 2, act of June 25, 1918 (40 Stat. 609).*

1918. Beneficiaries.—* * * The insurance shall be payable only to a spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them. * * * *Sec. 402, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 409), as amended by sec. 21, act of June 25, 1918 (40 Stat. 615).*

That the permitted class of beneficiaries for insurance as specified in section 402 of the War Risk Insurance Act is hereby enlarged so as to include, in addition to the persons therein enumerated, uncles, aunts, nephews, nieces, brothers-in-law and sisters-in-law of the insured. This section shall be deemed to be in effect as of October 6, 1917: * * * *Sec. 13, act of Dec. 24, 1919 (41 Stat. 375).*

1919. Brother and sister defined.—The terms "brother" and "sister" include brothers and sisters of the half blood as well as those of the whole blood, step-brothers and stepsisters, and brothers and sisters through adoption. *Sec. 22 (5), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 401).*

The terms "brother" and "sister" include the children of a person who, for a period of not less than one year, stood in loco parentis to a member of the military or naval forces of the United States at any time prior to his enlistment or induction, or another member of the same household as to whom such person during such period likewise stood in loco parentis: *Provided*, That this

subdivision shall be deemed to be in effect as of October 6, 1917. *Sec. 22 (5a), added to the act of Sept. 2, 1914, by sec. 4, act of Dec. 24, 1919 (41 Stat. 371).*

1920. Grandchild defined.—The term "grandchild" means a child as above defined of a child as above defined. *Sec. 22 (2), added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 401).*

1921. Change of beneficiaries.—* * * Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries, but only within the classes herein provided. * * * *Sec. 402, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 409), as amended by sec. 21, act of June 25, 1918 (40 Stat. 615).*

1922. Assignment within the permitted class of beneficiaries.—That the provisions of section 28 of the War Risk Insurance Act shall not be construed to prohibit the assignment by any person to whom converted insurance shall be payable under Article IV of such Act of his interest in such insurance to any other member of the permitted class of beneficiaries. *Sec. 6, act of Dec. 24, 1919 (41 Stat. 372).*

See 1900, ante.

1923. Payment of insurance if designated beneficiary has died.—That if any person to whom such yearly renewable term insurance has been awarded dies, or his rights are otherwise terminated after the death of the insured, but before all of the two hundred and forty monthly installments have been paid, then the monthly installments payable and applicable shall be payable to such person or persons within the permitted class of beneficiaries as would, under the laws of the State of residence of the insured, be entitled to his personal property in case of intestacy; and if the permitted class of beneficiaries be exhausted before all of the two hundred and forty monthly installments have been paid, then there shall be paid to the estate of the last surviving person within the permitted class the remaining unpaid monthly installments. *Sec. 15, act of Dec. 24, 1919 (41 Stat. 376).*

1924. Payment where no beneficiary is named.—* * * If no beneficiary within the permitted class be designated by the insured, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the insured, the insurance shall be payable to such person or persons within the permitted class of beneficiaries as would under the laws of the State of the residence of the insured be entitled to his personal property in case of intestacy. * * * *Sec. 402, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 410), as amended by sec. 21, act of June 25, 1918 (40 Stat. 615).*

Notes of Decisions.

Payment of value to estate of insured authorized.—Inclusion in the converted insurance policies proposed to be issued under the war-risk insurance act of a provision that the commuted value of the policy shall be payable to the estate of the insured, in the event of the failure of any person within

the permitted classes to survive the insured, or in the event of the exhaustion by death of all persons within those classes before the payment of the full number of installments provided for, is authorized by the law and will be valid. 31 Op. Atty. Gen. 387.

1925. Payment of converted insurance if no beneficiary is named.—That if no beneficiary within the permitted class be designated by the insured as beneficiary for converted insurance, granted under the provisions of Article IV of

the War Risk Insurance Act, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the insured, then there shall be paid to the estate of the insured the remaining unpaid monthly installments; or if the designated beneficiary survives the insured and dies before receiving all of the installments of converted insurance payable and applicable, then there shall be paid to the estate of such beneficiary the remaining unpaid monthly installments. *Sec. 16, act of Dec. 24, 1919 (41 Stat. 376).*

1926. Insurance paid to soldier's estate if no heir within permitted class survives.—* * * If no such person survive the insured, then there shall be paid to the estate of the insured an amount equal to the reserve value, if any, of the insurance at the time of his death, calculated on the basis of the American Experience Table of Mortality and three and one-half per centum interest in full of all obligations under the contract of insurance. *Sec. 402, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1915 (40 Stat. 410), as amended by sec. 21, act of June 25, 1918 (40 Stat. 616).*

That if no person within the permitted class of beneficiaries survive the insured, then there shall be paid to the estate of the insured the monthly installments payable and applicable under the provisions of Article IV of the War Risk Insurance Act. *Sec. 14, act of Dec. 24, 1919 (41 Stat. 376).*

1927. Terms and conditions of insurance contracts.—That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * * *Sec. 402, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 409), as amended by sec. 21, act of June 25, 1918 (40 Stat. 615).*

1928. Premium rates.—* * * The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum. *Sec. 403, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 410).*

1929. Calculations based upon American Experience Table of Mortality.—* * * All calculations shall be based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum, except that no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues more than two hundred and forty months. * * * *Sec. 402, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 409), as amended by sec. 21, act of June 25, 1918 (40 Stat. 615).*

1930. Term form of insurance.—That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. * * * *Sec. 404, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 410).*

Notes of Decisions.

Conversion of term insurance.—The Bureau of War Risk Insurance may, without awaiting the formal termination of the war as declared by proclamation of the President of the United States, convert war-time term

insurance heretofore granted under the provisions of the war-risk insurance act into other forms of insurance authorized by said act. 31 Op. Atty. Gen. 382.

1931. Conversion of term insurance into other forms.—* * * Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be con-

verted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election. *Sec. 404, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 410).*

1932. Payment in installments.— * * * The insurance shall be payable in two hundred and forty equal monthly installments. * * * *Sec. 402, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 409), as amended by sec. 21, act of June 25, 1918 (40 Stat. 615).*

* * * *Provided*, That nothing herein shall be construed to interfere with the payment of the monthly installments authorized to be made under the provisions of said War Risk Insurance Act, as originally enacted and subsequently amended, up to and including the second calendar month after the passage of this Act: *Provided further*, That all awards of insurance under the provisions of the said War Risk Insurance Act, as originally enacted and subsequently amended, shall be revised as of the first day of the third calendar month after the passage of this Act, in accordance with the provisions of the said War Risk Insurance Act as modified by this amendatory Act. *Sec. 13, act of Dec. 24, 1919 (41 Stat. 375-376).*

1933. Payment of installments of automatic insurance.— * * * If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then \$25 per month shall be paid to his widow from the time of his death and during her widowhood; or if there is no widow surviving him, then to his child or children; or if there is no child surviving him, then to his mother; or if there be no mother surviving him, then to his father, if and while they survive him: *Provided, however*, That no more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid. The amount of the monthly installments shall be apportioned between children as may be provided by regulations: * * * *Sec. 401, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 409), as amended by sec. 12, act of Dec. 24, 1919 (41 Stat. 375).*

1934. Alternative methods of payment.— * * * Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. * * * *Sec. 402, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 409), as amended by sec. 21, act of June 25, 1918 (40 Stat. 615).*

That the Bureau of War Risk Insurance may make provision in the contract for converted insurance for optional settlement, to be selected by the insured, whereby such insurance may be made payable either in one sum or in installments for thirty-six months or more. The bureau may also include in said contract a provision authorizing the beneficiary to elect to receive payment

of the insurance in installments for thirty-six months or more, but only if the insured has not exercised the right of election as hereinbefore provided; and even though the insured may have exercised his right of election, the said contract may authorize the beneficiary to elect to receive such insurance in installments spread over a greater period of time than that selected by the insured. *Sec. 17, act of Dec. 24, 1919 (41 Stat. 376).*

1935. Payment of war risk insurance by the United States.—That the United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. * * * *Sec. 403, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 410).*

That there is hereby appropriated, from any money in the Treasury not otherwise appropriated, the sum of \$23,000,000, to be known as the military and naval insurance appropriation. All premiums that may be collected for the insurance provided by the provisions of Article IV shall be deposited and covered into the Treasury to the credit of this appropriation.

Such sum, including all premium payments, is hereby available for the payment of the liabilities of the United States incurred under contracts of insurance made under the provisions of Article IV. Payments from this appropriation shall be made upon and in accordance with awards by the director. *Sec. 20, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 400).*

1936. United States Government life insurance fund.—That all premiums paid on account of insurance converted under the provisions of Article IV of the War Risk Insurance Act shall be deposited and covered into the Treasury to the credit of the United States Government life insurance fund and shall be available for the payment of losses, dividends, refunds, and other benefits provided for under such insurance. Payments from this fund shall be made upon and in accordance with awards by the director.

The Bureau of War Risk Insurance is hereby authorized to set aside out of the fund so collected such reserve funds as may be required, under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest the said United States Government life insurance fund, or any part thereof, in interest-bearing obligations of the United States and to sell the obligations for the purposes of the said fund. *Sec. 18, act of Dec. 24, 1919 (41 Stat. 376).*

1937. Bureau of War Risk Insurance.—That there is established in the Treasury Department a Bureau to be known as the Bureau of War Risk Insurance. * * * *Sec. 1, act of Sept. 2, 1914 (38 Stat. 711), as amended by sec. 1, act of Oct. 6, 1917 (40 Stat. 398).*

The Bureau of War Risk Insurance was established in the Treasury Department by the act of Oct. 6, 1917 (40 Stat. 399), which extended the marine insurance act of Sept. 2, 1914 (38 Stat. 711), to provide for persons in the military and naval service. Provision was made by sec. 14 of said act for an advisory board of three members skilled in insurance to assist in fixing premium rates and adjusting claims for losses under contracts of insurance. Sec. 313 of the same act provided that "nothing in this section shall be construed to impose any administrative duties upon the War and Navy Departments."

1938. Surgeons of the Army to assist the Bureau of War Risk Insurance.— * * * The bureau shall, by arrangement with the Secretary of War and the Secretary of the Navy, respectively, make use of the services of surgeons in the Army and Navy. * * * *Sec. 14, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 399).*

1939. Compelling testimony.—That for the purpose of this Act, the director, commissioners, and deputy commissioners shall have power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles, to require the production of books, papers, documents, and other evidence, to administer oaths and to examine witnesses upon any matter within the jurisdiction of the bureau. The director may obtain such information and such reports from officials and employees of the departments of the Government of the United States and of the States as may be agreed upon by the heads of the respective departments. In case of disobedience to a subpoena, the bureau may invoke the aid of any district court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court, within the jurisdiction of which the inquiry is carried on, may, in case of contumacy or refusal to obey a subpoena issued to any officer, agent, or employee of any corporation or other person, issue an order requiring such corporation or other person to appear before the bureau, or give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. * * * *Sec. 15, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 399).*

1940. Fees and mileage of witnesses.— * * * Any person so required to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States. *Sec. 15, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 399).*

1941. Bureau of War Risk Insurance to assist and represent policyholders.—That the Bureau of War Risk Insurance, so far as practicable, shall upon request furnish information to and act for persons in the military or naval service, with respect to any contracts of insurance whether with the Government or otherwise, as may be prescribed by regulations. * * * *Sec. 24, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 402).*

1942. Record of insurance.—Said bureau may upon request procure from and keep a record of the amount and kind of insurance held by every commissioned and appointive officer and of every enlisted man in the military or naval service of the United States, including the name and principal place of business of the company, society, or organization in which such insurance is held, the date of the policy, amount of premium, name and relationship of the beneficiary, and such other data as may be deemed of service in protecting the interests of the insured and beneficiaries. *Sec. 24, added to the act of Sept. 2, 1914, by sec. 2, act of Oct. 6, 1917 (40 Stat. 402).*

1943. Citation of the war-risk insurance act.—That this Act may be cited as the war-risk insurance Act. *Sec. 30, added to the act of Sept. 2, 1914, by sec. 2, act of June 25, 1918 (40 Stat. 610).*

CHAPTER 30.

THE SOLDIERS' HOMES.

The Soldiers' Home:

Established, 1944.

Members—

Admission, 1945.

Pensioners, 1946.

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Financial report, 1964.

Intoxicants prohibited, 1965.

National Home for Disabled Volunteer Soldiers:

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1944. The Soldiers' Home established.—All soldiers of the Army of the United States, and all soldiers who have been, or may hereafter be, of the Army of the United States, and who have contributed, or may hereafter contribute, according to section forty-eight hundred and nineteen, to the support of the Soldiers' Home hereby created, and the invalid and disabled soldiers, whether regulars or volunteers, of the war of eighteen hundred and twelve, and of all subsequent wars, shall, under the restrictions and provisions which follow, be

members of the Soldiers' Home, with all the rights annexed thereto. *R. S. 4814.*

Deductions from the pay of soldiers for the support of the home, formerly required by *R. S. 4819*, have been discontinued as directed by act of June 12, 1906 (34 Stat. 242), and by act of May 11, 1908 (35 Stat. 110). See 1956. post.

R. S. 4117 provided that the commissioners of the Soldiers' Home, by and with the approval of the President, shall procure for immediate use, at a suitable place or places, a site or sites for the Soldiers' Home, and if the necessary buildings can not be procured with the sites, to have the same erected, having due regard to the health of the locations, facility of access, and economy, and giving preference to such places as, with the most convenience and least cost, will accommodate the persons entitled to the benefits of the Soldiers' Home.

1945. Veterans entitled to the benefits of the Soldiers' Home.—The following persons, members of the Soldiers' Home, according to section forty-eight hundred and fourteen, shall be entitled to the rights and benefits herein conferred, and no others:

First. Every soldier of the Army of the United States who has served, or may serve, honestly and faithfully twenty years in the same.

Second. Every soldier and every discharged soldier, whether regular or volunteer, who has suffered, or may suffer, by reason of disease or wounds incurred in the service and in the line of his duty, rendering him incapable of further military service, if such disability was not occasioned by his own misconduct.

Third. The invalid and disabled soldiers, whether regulars or volunteers, of the wars of eighteen hundred and twelve and of all subsequent wars. *R. S. 4821.*

Insane inmates of the Soldiers' Home were entitled to admission to the Government hospital for the insane by act of July 7, 1884, post, 2051.

1946. Rights of pensioners as members of the Soldiers' Home.—The fact that one to whom a pension has been granted for wounds or disability received in the military service has not contributed to the funds of the Soldiers' Home shall not preclude him from admission thereto. But all such pensioners shall surrender their pensions to the Soldiers' Home during the time they remain therein and voluntarily receive its benefits. *R. S. 4820.*

See sec. 4, act of Mar. 3, 1883, ante 1847, which has been construed as requiring no longer a surrender of pension under any circumstances as a condition of admission to the home.

Notes of Decisions.

Surrender of pensions.—Under this section only the invalid pensioners who had not contributed to the funds are bound to surrender their pensions. *U. i. v. Bowen* (1879), 100 U. S. 508, 512, 25 L. Ed. 681, affirming 14 Ct. Cl. 162.

1947. Discharge from the Soldiers' Home.—Any soldier admitted into the Soldiers' Home for disability who recovers his health, so as to become fit again for military service, if under fifty years of age, shall be discharged. *R. S. 4823.*

1948. Exclusion of ex-convicts from the Soldiers' Home.—The benefits of the Soldiers' Home shall not be extended to any soldier in the regular or volunteer service, convicted of felony or other disgraceful or infamous crimes of a civil nature after his admission into the service of the United States; nor shall any one who has been a deserter, mutineer, or habitual drunkard be received, without such evidence of subsequent service, good conduct, and reformation of character, as is satisfactory to the commissioners. *R. S. 4822.*

1949. Uniforms for members of the Soldiers' Home.—That a suitable uniform shall be furnished to every inmate of the Home, without cost to him. *Sec. 5, act of Mar. 3, 1883 (22 Stat. 565).*

1950. Rules for the members of the Soldiers' Home.—All persons admitted into the Soldiers' Home shall be subject to the Rules and Articles of War in the same manner as soldiers in the Army. *R. S. 4824.*

See A. W. 2, ch. 52, post.

Notes of Decisions.

Maintenance of discipline—Frequenting public places.—Under this section and sec. 1968, post, the governor of the home, to maintain discipline, may promulgate such special orders as he deems proper, including the right to forbid the inmates to frequent a public place, where they are permitted to obtain liquor, or are afforded degrading and immoral amusements, or exposed to improper temptations. *Rowan v. Butler (Ind. 1908), 85 N. E. 714.* (This decision evidently confuses the Soldiers' Home with a branch of the National Home

for Disabled Volunteer Soldiers. See 1968, post.)

Where the governor of the soldiers' home, within the scope of his authority, prohibited members of the home from entering complainant's restaurant, described in the order as a "saloon," the making and enforcement of such order was not actionable by complainant, unless false in substance and promulgated and enforced by defendants with knowledge of its falsity and with malice. *Id.*

1951. Outdoor relief by the Soldiers' Home.—That the board of commissioners are authorized to aid persons who are entitled to admission to the Home, by out-door relief, in such manner and to such an extent as they may deem proper; but such relief shall not exceed the average cost of maintaining an inmate of the Home. *Sec. 6, act of Mar. 3, 1883 (22 Stat. 565).*

1952. Composition of the Board of Commissioners of the Soldiers' Home.—
* * * *Provided,* That hereafter the government and control of the United States Military Prison shall, under the Secretary of War, be vested in the Board of Commissioners of the United States Soldiers' Home, which board shall consist as at present of the Surgeon-General, the Commissary-General, the Adjutant-General, the Quartermaster-General, the Chief of Engineers, the Judge-Advocate-General, and the Governor of the Home, and the president of said board, who shall be the senior in rank of the members thereof, shall submit annually to the Secretary of War, for transmission to Congress, a full statement of the financial and other affairs of both the home and the prison for the preceding fiscal year. *Sec. 1, act of Mar. 4, 1909 (35 Stat. 1004), making appropriations for sundry civil expenses.*

* * * and any four of them shall constitute a quorum for the transaction of business. *Sec. 10, act of Mar. 3, 1883 (22 Stat. 565).*

The government and control of the United States Disciplinary Barracks, formerly known as the military prison, is now vested in The Adjutant General of the Army by sec. 2 (3), act of Mar. 4, 1915, 529, ante, superseding the provisions of this section in so far as the military prison is concerned.

Notes of Decisions.

Substitutes for members of board.—A person duly designated to take charge of the office of Judge Advocate General and to perform its duties pending the suspension from duty of the Judge Advocate General, is qualified under this section to act as one of the Board of Commissioners of the Soldiers' Home in the District of Columbia. (1892) 20 Op. Atty. Gen. 483.

When the place of any chief of bureau named in this section has been temporarily filled under sec. 178, R. S., the person so temporarily acting may perform the duties of such officer as a member of the Board of Commissioners of the Soldiers' Home, just as he performs the other duties of the officer in whose stead he is acting. (1901) 23 Op. Atty. Gen. 473.

1953. Duties of the Board of Commissioners of the Soldiers' Home.— * * * a board of commissioners for the Soldiers' Home, * * * whose duty it shall be to examine and audit the accounts of the treasurer quarter-yearly, and to visit and inspect the Soldiers' Home at least once in every month. The majority shall also have power to establish, from time to time, regulations for the general and internal direction of the institution, to be submitted to the Secretary of War for approval; and may do any other acts necessary for the government and interest of the same, as authorized by this chapter. *R. S. 4815.*

The portions of this section omitted here prescribing the composition of the board of commissioners and the number who should constitute a quorum were superseded by the different provisions relating thereto of section 10, act of Mar. 3, 1883, and act of Mar. 4, 1909, ante, 1952. The Inspector General of the Army was required personally to inspect, once in each year, the records, management, etc., of the home, and report thereon in writing, by section 2, act of Mar. 3, 1883, ante 545.

Notes of Decisions.

Powers of board.—While act of Jan. 21, 1871 (16 Stat. 399), ceding back to the State of Ohio jurisdiction over property theretofore ceded to the United States for a soldiers' home, conferred jurisdiction on the State over the place or ground where the institution was located, it conferred no jurisdiction on the State's authorities, under its police power, to regulate or prohibit the furnishing of any article of food to the inmates of the home by the Federal authorities. *Ohio v. Thomas* (1890), 19 Sup. Ct. 453, 173 U. S. 276, 43 L. Ed. 699, affirming order in *re Thomas* (1898), 87 Fed. 453, 31 C. C. A. 80.

The act establishing the military asylum does not constitute the commissioners a corporation, with capacity to sue and be sued. (1851) 5 Op. Atty. Gen. 398.

The board of commissioners of the soldiers' home can not delegate to the governor of the home discretionary police authority for the preservation of good order within its limits. Nor can it empower the governor to arrest, detain, and deliver over to the civil authorities non-military persons committing crimes less than capital within the limits of the home, except in the cases where any person may make an arrest without warrant or precept. The board can, however, by regulation duly made, invest him with authority to expel from the grounds persons not inmates of the home offending against good order and decency. (1893) 20 Op. Atty. Gen. 514.

1954. Officers of the Soldiers' Home.—The officers of the Soldiers' Home shall consist of a governor, a deputy governor, and a secretary, for each separate site of the home, the latter to be also the treasurer; and the officers shall be taken from the Army, and appointed or removed, from time to time, as the interests of the institution may require, by the Secretary of War, on the recommendation of the board of commissioners. *R. S. 4816.*

That the governor and all other officers of the Home shall be selected by the President of the United States, * * *. *Sec. 7, act of March 3, 1883 (22 Stat. 565).*

Retired officers of the Army might be assigned to duty at the Soldiers' Home by *R. S. 1259, post 2429.*

Notes of Decisions.

Approval of recommendations of board.—The Secretary of War is vested with a discretionary power to approve or disapprove recommendations made by the board of commissioners of the soldiers' home under this section. (1882) 17 Op. Atty. Gen. 449.

Salary of treasurer.—The board is not prohibited from paying the treasurer, out

of the funds of the home, a reasonable salary for his services. Such compensation is not pay or emoluments received from the Government. (1892) 20 Op. Atty. Gen. 350.

Subsistence of governor, etc.—The board of commissioners of the soldiers' home are authorized to permit the governor, deputy governor, and treasurer, who are retired

officers of the Army and reside at the home and have its affairs in charge, to make use of ordinary supplies of fuel, light, forage, milk, ice, or vegetables produced at and obtained for use at the home, provided they are not excessive in amount or value. The articles in question are not pay or emoluments received from the Gov-

ernment but merely an indirect application of a small fraction of the trust funds to the benefit of cestui que trust. The practice, acquiescence, and congressional approval have established the construction of law which permit the allowances in question. (1892) 20 Op. Atty. Gen. 350.

1955. Treasurer of the Soldiers' Home to give bond.— * * * and the Treasurer of the Home shall be required to give a bond in the penal sum of twenty thousand dollars for the faithful performance of his duty. *Sec. 7, act of Mar. 3, 1883 (22 Stat. 565).*

1956. Donations to the Soldiers' Home.— * * * The commissioners are also authorized to receive all donations of money or property made by any person for the benefit of the institution, and hold the same for its sole and exclusive use. * * * *R. S. 4819.*

So much of the section as required that 12½ cents per month be deducted from the pay of retired enlisted men and passed to the credit of the commissioners of the Soldiers' home, was repealed by a provision of act of June 12, 1906 (34 Stat. 242).

And so much of the section as pertained to the deduction of 12½ cents per month from the pay of every soldier of the Regular Army for the benefit of the Soldiers' Home was repealed by a provision of act of May 11, 1908 (35 Stat. 110).

1957. Forfeitures of pay of soldiers devoted to the Soldiers' Home.—For the support of the Soldiers' Home the following funds are set apart, and are hereby appropriated: All stoppages or fines adjudged against soldiers by sentence of courts-martial, over and above any amount that may be due for reimbursement of Government or of individuals; all forfeitures on account of desertion; * * * *R. S. 4818.*

See also *R. S. 3689*, post 1050.

1958. Unclaimed estates of soldiers allowed to the Soldiers' Homes.— * * * and all moneys belonging to the estates of deceased soldiers, which are or may be unclaimed for the period of three years subsequent to the death of such soldiers, to be repaid by the commissioners of the institution, upon the demand of the heirs or legal representatives of the deceased. *R. S. 4818.*

The adjustment of accounts under this section was limited to claims arising subsequent to Mar. 3, 1881, by a provision of act of July 16, 1892 (27 Stat. 103).

Notes of Decisions.

Estates of deceased soldiers.—The appropriation for a military asylum for the relief and support of invalid and disabled soldiers of the Army of the United States, made by act of Mar. 3, 1851, includes the unclaimed extra pay allowed to soldiers by sec. 5, act of July 19, 1848. (1851) 5 Op. Atty. Gen. 385.

It is to take effect, however, only according to the provisions of the seventh section of the act, and to be afterwards re-

paid by the commissioners of the asylum upon demand of the heirs or legal representatives of the deceased. *Id.*

This section as originally enacted appropriated all moneys belonging to the estates of deceased soldiers remaining unclaimed for three years subsequent to the soldier's death, so that such moneys might be drawn from the Treasury without further special appropriation. (1853) 5 Op. Atty. Gen. 677.

1959. Permanent fund for the Soldiers' Home.—There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same respectively; and such appropriations shall be deemed permanent annual appropriations. * * *

Soldiers' Home:

Of all stoppages or fines adjudged against soldiers by sentence of court-martials, over and above any amount that may be due for the re-imbursement of Government or of individuals; all forfeitures on account of desertion; and all moneys belonging to the estates of deceased soldiers, which now are or may hereafter be unclaimed for the period of three years subsequent to the death of said soldier or soldiers, to be repaid by the commissioners of the institution, upon the demand of the heirs or legal representatives of the deceased. * * * R. S. 3689.

That all funds of the Home not needed for current use, and which are not now invested in United States registered bonds, shall, as soon as received, or as soon as present investments can be converted into money without loss, be deposited in the Treasury of the United States to the credit of the Home as a permanent fund, and shall draw interest at the rate of three per centum per annum, which shall be paid quarterly to the treasurer of the Home; and the proceeds of such registered bonds, as they are paid, shall be deposited in like manner. No part of the principal sum so deposited shall be withdrawn for use except upon a resolution of the board of commissioners stating the necessity and approved by the Secretary of War. *Sec. 8, act of Mar. 3, 1883 (22 Stat. 565).*

The provisions of this section relative to the custody of the Soldiers' Home funds were modified by 1960, post.

Provisions setting apart, for support of the home, the funds appropriated by this provision, were made by R. S. 4818, ante, 1957.

Notes of Decisions.

<p>Retroactive statutes.—An appropriation act may withhold the moneys appropriated from past transactions, but that will not</p>	<p>make the statute retroactive. <i>Gardner v. U. S. (1889), 25 Ct. Cl. 24.</i></p>
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1960. Deposit of funds of the Soldiers' Home.—That the Treasurer of the United States be, and he is hereby, authorized and directed to receive and keep on deposit, subject to the checks or drafts of the treasurer of the Soldiers' Home in the District of Columbia, all funds which may now be under the control of the said treasurer of the Soldiers' Home, or may hereafter be furnished him or in any manner come into his possession for use in defraying the current expenses of maintaining the said Soldiers' Home, and, upon the request of said treasurer of the Soldiers' Home, there shall be transferred, from funds to his credit with the United States Treasurer, and placed to his credit with the assistant treasurer of the United States in New York City, New York, such sums as he may require monthly or quarterly for payments on account of "out-door relief" to members of the said Soldiers' Home residing at a distance therefrom. *Act of Jan. 16, 1891 (26 Stat. 718.)*

This act modified the provisions of 1959, ante.

1961. Borrowing money on the credit of the Soldiers' Home.—That no officers of the Home shall borrow any money on the credit of the Home for any purpose, nor shall any pledge of any of its property or securities for any purpose be valid. *Sec. 9, act of Mar. 3, 1883 (22 Stat. 565).*

1962. Limitation on expenditures for the Soldiers' Home.—That no new buildings shall be erected or new grounds purchased, nor shall any expenditure of more than five thousand dollars be made, until the action of the board thereon shall be approved by the Secretary of War. All supplies that can be pur-

chased upon contract shall be so purchased, after due notice by advertisement, of the lowest responsible bidder. Such bidder shall give bond, with proper security, for the performance of his contract. *Sec. 3, act of Mar. 3, 1883 (22 Stat. 564).*

1963. Adjustment of accounts of the Soldiers' Home.—That hereafter the adjustment of the accounts of the Soldiers' Home under section forty-eight hundred and eighteen, of the Revised Statutes, in the offices of the Second Comptroller and Second Auditor, shall be limited to those originating subsequent to March third, eighteen hundred and eighty-one. *Act of July 16, 1892 (27 Stat. 193).*

See secs. 1957 and 1958, ante.

1964. Financial report of the Soldiers' Home.—That the board of commissioners of the Soldiers' Home shall every year report in writing to the Secretary of War, giving a full statement of all receipts and disbursements of money, of the manner in which the funds are invested of any changes in the investments and the reasons therefor, of all admissions and discharges, and generally of all facts that may be necessary to a full understanding of the condition and management of the Home. The Secretary of War shall have power to call for and require any omitted facts which in his judgment should be stated to be added. This annual report shall be, by the Secretary of War, together with the report of the inspecting officer hereinafter provided for, transmitted to Congress at the first session thereafter, and he shall also cause the same to be published in orders to the Army, a copy thereof to be deposited in each garrison and post library. *Sec. 1, act of Mar. 3, 1883 (22 Stat. 564).*

1965. Prohibition of intoxicants about the Soldiers' Home.—That on and after the passage of this act no license for the sale of intoxicating liquor at any place within one mile of the Soldiers' Home property in the District of Columbia shall be granted. *Act of Feb. 28, 1891 (26 Stat. 797).*

1966. Veterans admitted to the National Home for Disabled Volunteer Soldiers.—The following persons shall be entitled to the benefits of the National Home for Disabled Volunteer Soldiers, and may be admitted thereto upon the order of a member of the board of managers, namely: Honorably discharged officers, soldiers, sailors, and marines who served in the regular, volunteer, or other forces of the United States in any war in which the country has been engaged, in campaigns against hostile Indians, or who served in any of the extraterritorial possessions of the United States, in foreign countries, including Mexican border service, or in the Organized Militia or National Guard when called into the Federal service, and who are disabled by diseases or wounds and by reason of such disability are either temporarily or permanently incapacitated from earning a living. *Act of June 5, 1920 (41 Stat. 905).*

A provision of act of May 26, 1900 (31 Stat. 217), reads as follows:

"Hereafter the following persons only shall be entitled to the benefits of the National Home for Disabled Volunteer Soldiers and may be admitted thereto upon the order of a member of the Board of Managers, namely: All honorably discharged officers, soldiers, and sailors who served in the regular or volunteer forces of the United States in any war in which the country has been engaged, who are disabled by disease, wounds, or otherwise, and who have no adequate means of support, and by reason of such disability are incapable of earning their living."

Sec. 5, act of Jan. 28, 1901 (31 Stat. 745), provided for the admission of veterans disabled by age. The admission of veterans of Indian wars was established by act of May 27, 1908 (35 Stat. 372). The act of Mar. 4, 1909 (35 Stat. 1012), provided for the admission of veteran soldiers who have served in the Philippines, in China, or in Alaska.

Sec. 1, act of Mar. 3, 1915 (39 Stat. 853), as amended by act of Oct. 6, 1917 (40 Stat. 368), extended the privileges of the home to all honorably discharged veterans of any war in which the country has been engaged, including the militia called into Federal service.

1967. Uniform of the National Home for Disabled Volunteer Soldiers.— * * * *And provided further*, That officers and members of the National Home for Disabled Volunteer Soldiers may, regardless of the preceding provisions of said Act, wear such uniform as the Secretary of War may authorize. *Sec. 125, act of June 3, 1916 (39 Stat. 217), as amended by sec. 10, chap. XVII, act of July 9, 1918 (40 Stat. 892).*

The "said Act" mentioned above refers to the national defense act of June 3, 1916.

1968. Rules for the National Home for Disabled Volunteer Soldiers.—All inmates of the National Home for Disabled Volunteer Soldiers shall be subject to the Rules and Articles of War, and in the same manner as if they were in the Army. *R. S. 4835.*

Notes of Decisions

Enforcement of discipline.—The provision that all inmates shall be subject to the rules and Articles of War in the same manner as if they were in the Army is designed, and can have force only for the management and preservation of discipline. Within legitimate exercise there can be no interference with that management by the civil authorities, and any inquiry would probably be exclusively of Federal cognizance. *In re Kelly (C. C. 1895), 71 Fed. 545, 546, 553.*

Under this section and sec. 1950, ante, the governor of the home, to maintain discipline, may promulgate such special orders as he deems proper, including the right to forbid the inmates to frequent a public place, where they are permitted to obtain liquor, or are afforded degrading and immoral amusements, or exposed to improper temptations. *Rowan v. Butler (Ind. 1908), 85 N. E. 714.*

Where the governor of the soldiers' home, within the scope of his authority, prohibited members of the home from entering complainant's restaurant, described in the order as a "saloon," the making and enforcement of such order was not actionable by complainant, unless false in substance and promulgated and enforced by defendants with knowledge of its falsity and with malice. *Id.*

Inmates' right to vote.—Act of Mar. 21, 1866 (14 Stat. 10), provides for the estab-

lishment of a national military asylum for the relief of disabled volunteers of the United States Army. Const. art. 1, sec. 8, subsec. 17, declares that Congress shall have power to exercise exclusive legislation over all places purchased by consent of the State for the erection of forts and other needful buildings. The State of Tennessee granted its consent to the acquisition, by the National Home for Disabled Volunteer Soldiers, of certain lands for the establishment of a branch of such home, providing that the act should not be construed to deny to inmates, who were qualified voters of the State, the right to vote. Const. Tenn. 1870, art. 4, provides that a voter shall be a citizen of the United States and a resident of the State for 12 months and of the county wherein he offers to vote for six months, preceding the day of election. Held that, the United States having exclusive jurisdiction over the land on which such branch home was erected, the inmates thereof, not being residents of the State, were not legal voters at elections therein. *State v. Willett (Tenn. 1906), 97 S. W. 299.*

Persons employed in the National Home for Disabled Volunteer Soldiers, and inmates working therein, who have homes and families outside the grounds where they spend their nights, being residents of the State, and otherwise qualified, are entitled to vote. *Id.*

1969. Outdoor relief and transfer of inmates of branches of the National Home for Disabled Volunteer Soldiers.—The Managers of the National Home for Disabled Volunteer Soldiers are authorized to aid persons who are entitled to its benefits by outdoor relief, in such manner and to such extent as they may deem proper, but such relief shall not exceed the average cost of maintaining an inmate of the Home: *Provided*, That in the event that buildings at any

Branch of the Home shall be destroyed by fire or rendered unfit for habitation because of pestilence or by the elements, then and in that event the Board of Managers shall have authority to remove the members of said Branch so afflicted or destroyed to any other Branch not so affected, and to do this they may use any funds appropriated for the Home, notwithstanding they may have been specifically appropriated for other purposes, to the extent that such funds shall be necessary to effect such a transfer and the maintenance and support thereafter of said members so transferred, and shall report their doings therein to the Congress and their expenditures as in other cases of expenditures: *Provided further*, That the appropriations for any fiscal year shall not be exceeded. *R. S. 4833, as amended by act of Aug. 23, 1894 (28 Stat. 492).*

This section, as enacted in the Revised Statutes, contained only the principal provision for outdoor relief, ending with the words "average cost of maintaining an inmate of the home."

This section as amended made an exception to *R. S. 3678, ante 222*, which required appropriations to be applied solely to the objects for which they were made.

1970. Transfer of inmates of branch homes.—To increase the comfort of the members, the Board of Managers, National Home for Disabled Volunteer Soldiers, is authorized to make such rules governing the assignment to the different branches of the various classes of those eligible to admission to the home as it deems advisable and best for the public service. *Act of June 5, 1920 (41 Stat. 905-906).*

1971. Headstones at Central Branch of the National Home for Disabled Volunteer Soldiers.—For maintaining and improving national cemeteries, * * * And the Board of Managers of the National Home for Disabled Volunteer Soldiers may charge the regulation stone to be used in the Central Branch at a cost not exceeding one dollar and fifty cents additional for each one. *Sec. 1, act of June 23, 1879 (21 Stat. 33), making appropriations for sundry civil expenses.*

1972. Board of managers of the National Home for Disabled Volunteer Soldiers.—The President, Secretary of War, Chief Justice, and such other persons as have been or from time to time may be associated with them, shall constitute a board of managers of an establishment for the care and relief of the disabled volunteers of the United States Army, to be known by the name and style of "The National Home for Disabled Volunteer Soldiers," and have perpetual succession, with powers to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules, and regulations, not inconsistent with law, for carrying on the business and government of the home, and to affix penalties thereto. *R. S. 4825.*

Nine managers of the National Home for Disabled Volunteers shall be elected from time to time, as vacancies occur, by joint resolution of Congress. They shall all be citizens of the United States, and all residents of States which furnished organized bodies of soldiers to aid in suppressing the rebellion commenced in eighteen hundred and sixty-one; and no two of them shall be residents of the same State, and no person who gave aid or countenance to the rebellion shall ever be eligible. The term of office of these managers shall be for six years, and until a successor is elected. *R. S. 4826.*

* * * *Provided*, Said board, after the passage of this resolution, shall be composed of seven members, and four members shall constitute a quorum

for the transaction of business at any regular or special meeting thereof. *Joint Res. 241, act of Oct. 19, 1914 (38 Stat. 780).*

The first word of R. S. 4826, "Nine," denoting the number of citizen managers, was superseded by the increase of the number to 10 by sec. 4, act of Mar. 2, 1887 (24 Stat. 444). It was further increased to 11 by Res. of Mar. 3, 1891, No. 21 (26 Stat. 1117), but was reduced to 5 by act of June 23, 1913, cited above.

Act of Mar. 8, 1901 (31 Stat. 1175), provided as follows:

"The jurisdiction over the places purchased and used for the location of the Branches of the National Home for Disabled Volunteer Soldiers, under and by the authority of an Act of Congress approved March twenty-first, eighteen hundred and sixty-six, in Milwaukee County, State of Wisconsin, and upon which said Branch Home is located, and by authority of an Act of Congress approved July fifth, eighteen hundred and eighty-eight, in the county of Leavenworth, State of Kansas, and upon which said Branch Home is located, is hereby ceded to the respective States in which said Branches are located and relinquished by the United States, and the United States shall claim or exercise no jurisdiction over said places after the passage of this Act: *Provided*, That nothing contained herein shall be construed to impair the powers or rights heretofore conferred upon or exercised by the Board of Managers of the National Home for Disabled Volunteer soldiers in and on said places." This was a provision accompanying appropriations for the support of the home in the sundry civil appropriation act for the fiscal year 1902. An act of Mar. 21, 1886, mentioned, was incorporated into R. S. 4825-4830. Act of July 5, 1894, evidently intended to be referred to instead of act of July 5, 1888, mentioned, authorized the establishment of a branch home in Kansas.

Notes of Decisions.

Operation of State laws.—Congress may enact such further laws as it may find necessary, and in so far as it legislates within its powers it excludes the operation of incompatible State laws, but, having abstained from such legislation, the laws of the State remain in force. In re Kelly (C. C. 1895), 71 Fed. 545, 553.

The provision that the board may make by-laws, rules, and regulations not inconsistent with law for carrying on the business and government of the home is designed and can have force only for the management and preservation of discipline. Within legitimate exercise there can be no interference with that management by the civil authorities, and any inquiry would probably be exclusively of Federal cognizance. *Id.*

The act of Jan. 21, 1871, recording to the State of Ohio "the jurisdiction over the place purchased for the location of the national asylum for disabled volunteer soldiers," is not nullified by the proviso contained therein that the act shall not be "construed to impair the powers and rights heretofore conferred upon the board of managers" of the asylum. *Renner v. Bennett* (1871), 21 Ohio St. 431.

The title to the premises occupied by the National Home for Disabled Volunteer Soldiers in Wisconsin is not in the United States, but in a corporation created by Congress; and although the legislature of Wisconsin attempted to cede to the United States jurisdiction over said premises (P. & L. Laws Wis. 1867, c. 275), the jurisdiction of the proper State courts over them

remains unimpaired. In re O'Connor (1875), 37 Wis. 379, 19 Am. Rep. 765.

Right to hold land.—A contention that the National Home was a corporation and a conveyance of the land to it was not a conveyance to the United States was without force. *State v. Willott* (Tenn. 1906), 97 S. W. 299.

Liability to suit.—The exemption of the United States from recovery of interest on its contracts, unless there is a stipulation to pay interest or a statute permitting its recovery, does not extend to the Mountain Branch of the National Home for Disabled Volunteer Soldiers, created by R. S. 4825 et seq., as a Government agency and invested with various powers, including the right and liability to sue and be sued. *National Home for Disabled Volunteer Soldiers v. Parrish* (1913), 33 Sup. Ct. 944, 229 U. S. 494, 57 L. Ed. 1296, affirming decree (1912) 194 Fed. 940, 114 C. C. A. 576.

A cross-bill against the National Home for Disabled Volunteer Soldiers, which was incorporated under act of Mar. 21, 1866, and the acts amendatory thereto (R. S. 4825 et seq.) as a Government agency and interest on a claim against the home. *National Home for Disabled Volunteer Soldiers v. Parrish* (1912), 194 Fed. 940, 114 C. C. A. 576; decree affirmed (1913), 33 Sup. Ct. 944, 229 U. S. 494 57 L. Ed. 1296.

The power to sue and be sued at law and in equity conferred on the corporation, being limited to matters within the scope of the other corporate powers with which it is vested, and the corporation being a

charitable institution engaged as an agency of the Federal Government in the discharge of a governmental function, it is not subject to suit in an action sounding in tort for damages for the alleged unlawful and wrongful or negligent acts of its officers in diverting or polluting the waters of a spring. *Lyle v. National Home for Disabled Volunteer Soldiers* (C. C. 1909), 170 Fed. 842, 843.

The National Home for Disabled Volunteer Soldiers, established under act of Mar. 21, 1866, R. S. 4825, this section, held not subject to trustee process in a suit brought in a State court. *Brooks Hardware Co. v. Greer* (1911), 87 A. 889, 111 Me. 78, 46 L. R. A. (N. S.) 301.

A grant of power given to the National Home for Disabled Volunteer Soldiers to sue and to be sued at law and in equity applies to such matters only as are within the scope of the other corporate powers of the defendant, and does not authorize such corporation to be sued in tort. *Overholser v. National Home for Disabled Volunteer Soldiers* (1903), 67 N. E. 487, 68 Ohio St. 236, 62 L. R. A. 936, 96 Am. St. Rep. 638.

The National Home for Disabled Volunteer Soldiers was created by an act of Congress for national purposes only, and as such is a part of the Government of the United States, and can not be sued in an action sounding in tort. *Id.*

Arrest of inmate by State authority.—In case of the arrest of an inmate of the National Home for Disabled Volunteer Soldiers, made while he was on duty within its limits, without any demand upon the

commandant, by the sheriff of the county, under a warrant in due form, the facts that the inmates of the home are by act of Congress subject to the rules and articles of war, in the same manner as if they were in the Army of the United States, and that the person so arrested had been punished for his offense by the authorities of the home, under the rules legally established for its government, do not affect the jurisdiction of the State court, or the legality of the arrest. *In re O'Connor* (1875), 37 Wis. 379, 19 Am. Rep. 765.

Jurisdiction of State courts of property of inmate.—An order of the county court requiring the governor of the National Home for Disabled Volunteer Soldiers to appear and submit to an examination on oath touching the property in his possession of an inmate of the home dying intestate is not invalid as conflicting with the acts of Congress and regulations made in pursuance thereof relating to the management of the home. *In re Doe's Estate* (1912), 138 N. W. 97, 151 Wis. 136.

Eligibility of Congressman.—There is no constitutional objection to the election of a Member of Congress as a member of the Board of Managers of the National Home for Disabled Volunteers, although such an election would seem to be contrary to sound public policy. (1907) 26 Op. Atty. Gen. 457.

The question as to whether a Congressman can be appointed a member of the board of managers of the soldiers' home, and become local manager of one of the homes, is wholly a matter for the decision of Congress itself. *Id.*

1973. Duties of the board of managers of the National Home for Disabled Volunteer Soldiers.—The board of managers shall make an annual report of the condition of the National Home for Disabled Volunteer Soldiers to Congress on the first Monday of every January; and the board shall examine and audit the accounts of the treasurer and visit the home quarterly. *R. S. 4834.*

1974. Report of managers and inspectors of National Home for Disabled Volunteer Soldiers.—That there shall be printed of the report of the Board of Managers of the National Home for Disabled Volunteer Soldiers for the fiscal year ending June thirtieth, nineteen hundred and three, in addition to the usual number, for the use of the National Homes for Disabled Volunteer Soldiers, five hundred copies of the report proper, bound in cloth; two hundred copies of the report of the inspection of the State Homes, bound in paper, and two hundred copies of the record of members, bound in cloth; and that hereafter the additional number of copies herein named of future annual reports of the Board of Managers of the National Home for Disabled Volunteer Soldiers, bound in the same manner as above described, shall be printed for the use of the National Homes. *Joint Res. 15, act of March 31, 1904 (33 Stat. 585).*

1975. Duties of the assistant general treasurer and assistant inspector-general.—* * * For * * * assistant general treasurer and assistant inspector-general, who shall hereafter, in the necessary absence or inability of the general treasurer, from any cause whatever, perform his duties and give bond to the general treasurer for the faithful performance of such duties, but the general treasurer shall in every respect be responsible, on his bond, to the United States for any default on the part of such assistant general treasurer and assistant inspector-general. * * * *Act of June 6, 1900 (31 Stat. 636).*

1976. Officers of the board of managers of the National Home for Disabled Volunteer Soldiers.—The twelve managers of the National Home for Disabled Volunteer Soldiers shall elect from their own number a president, who shall be the chief executive officer of the board, two vice-presidents, and a secretary. Seven of the board, of whom the president or one of the vice-presidents shall be one, shall form a quorum for the transaction of business at any meeting of the board. *R. S. 4827.*

The word "twelve," in this section, denoting the number of managers in the board composed of the three officers named in *R. S. 4825*, and the nine required to be elected by *R. S. 4826*, were superseded by changes in the number by subsequent provisions, particularly the provision of act of June 23, 1913, ante, 1972.

Joint Res. 241, act of Oct. 19, 1914, ante, 1972, provides that four members shall constitute a quorum as there provided.

1977. Expenses of board of managers of the National Home for Disabled Volunteer Soldiers, and salaries of officers.—No member of the board of managers of the National Home shall receive any compensation as such member. But the traveling and other actual expenses of a member incurred while upon the business of the home may be paid, and any member of the board having other duties connected with the home may receive a reasonable compensation therefor, to be determined by the board. *R. S. 4828.*

Board of managers: President, \$4,000; secretary, \$500; general treasurer, who shall not be a member of the board of managers, \$5,000; chief surgeon, \$4,500; assistant general treasurer, \$3,500; inspector general, \$3,500; clerical services for the offices of the president, general treasurer, and inspector general and chief surgeon, \$19,000; clerical services for managers, \$2,700; traveling expenses of the board of managers, their officers, and employees, including officers of branch homes when detailed on inspection work, \$14,000; outside relief, \$100; legal services, medical examinations, stationery, telegrams, and other incidental expenses, \$1,700; in all, \$58,500. *Act of Mar. 4, 1921 (41 Stat. 1396)*, making appropriations for sundry civil expenses: National Home for Disabled Volunteer Soldiers.

The salaries of the president and secretary of the board were fixed, and the allowance of mileage for the members of the board was prescribed by a provision of act of Aug. 18, 1894, which modified *R. S. 4828*. This was superseded by the act cited above.

1978. Officers of the National Home for Disabled Volunteer Soldiers.—The officers of the National Home shall consist of a governor, a deputy governor, a secretary, a treasurer, and such other officers as the managers may deem necessary. They shall be appointed from honorably discharged soldiers who served as mentioned in the following section; and they may be appointed and removed, from time to time, as the interests of the institution may require, by the Board of Managers. *R. S. 4829.*

That section forty-eight hundred and twenty-nine of the Revised Statutes of the United States be amended by the addition of the following

words: "Provided, That surgeons, assistant surgeons, and other medical officers of the National Home for Disabled Volunteer Soldiers, and the several branches thereof, may be appointed from others than those who have been disabled in the military service of the United States." *Act of February 9, 1897 (29 Stat. 517), amending R. S. 4829.*

* * * *Provided further*, That no person shall be eligible to or hold any position or employment in the government or management of any home who is interested in or connected with, directly or indirectly, any brewery, dram-shop, or distillery in the State where such home is located. *Act of Mar. 3, 1887 (24 Stat. 540), making appropriations for sundry civil expenses.*

The "following section" of the Revised Statutes, referred to in this section, R. S. 4830, is set forth 1997, post.

Notes of Decisions.

Status of governor.—The governor of the National Home for Disabled Volunteer Soldiers is not an "officer" of the United

States. In re Doe's Estate (Wis. 1912), 138 N. W. 97.

1979. Veterans preferred as officers of the National Home for Disabled Volunteer Soldiers.—Hereafter the officers of the National Home for Disabled Volunteer Soldiers, and officers under the Board of Managers thereof, shall be appointed, so far as may be practicable, from persons whose military or naval service would render them eligible, if disabled and not otherwise provided for, for admission to the Home, and they may be appointed, removed, and transferred, from time to time, as the interests of the institution may require, by the Board of Managers. *Act of June 28, 1902 (32 Stat. 472).*

1980. Pay and mileage allowance of officers of the National Home for Disabled Volunteer Soldiers.—That the Board of Managers shall classify all the officers and employees of the National Home for Disabled Volunteer Soldiers and establish a rate of pay and allowance for each class, and the rate so established shall not be increased by fees, perquisites, allowances, or advantages under any pretense whatever; and no employee shall be borne on more than one pay roll or voucher.

That when an officer of the National Home for Disabled Volunteer Soldiers, not a member of the Board of Managers thereof, travels under orders on business for the Home he shall be allowed seven cents in lieu of all other expenses for each mile actually traveled, distance to be computed by the most direct through route. *Act of Aug. 18, 1894 (28 Stat. 412), making appropriations for sundry civil expenses.*

1981. Treasurers of the National Home for Disabled Volunteer Soldiers to give bonds.—The general treasurer shall give good and sufficient bond to the United States in a sum not less than one hundred thousand dollars, as the Secretary of War may direct, and to be approved by him, faithfully to account for all public moneys and property which he may receive, and the treasurers of the several Branch Homes shall give good and sufficient bonds to the general treasurer in such sums as he may require, and to be approved by him, faithfully to account for all public moneys and property which they may receive. *Act of Aug. 18, 1894 (28 Stat. 412), making appropriations for sundry civil expenses.*

1982. Funds for the National Home for Disabled Volunteer Soldiers.— * * * And from and after the first day of April, eighteen hundred and seventy-five, no money shall be appropriated or drawn for the support and maintenance of what is now designated by law as the "National Home for Disabled Volunteer Soldiers," except by direct and specific annual appropriations by law.

* * * And no moneys shall, after the first day of April, eighteen hundred and seventy-five, be drawn from the Treasury for the use of said home, except in pursuance of quarterly estimates, and upon quarterly requisitions by the managers thereof upon the Secretary of War, based upon such quarterly estimates, for the support of said home for not more than three months next succeeding such requisition. And no money shall be drawn or paid upon any such requisition while any balance heretofore drawn or received by said home, or for its use, from the Treasury, under the laws now or heretofore existing, and now held under investment or otherwise, shall remain unexpended. * * * *Sec. 1, act of Mar. 3, 1875 (18 Stat. 359), making appropriations for legislative, executive, and judicial expenses, War Department.*

The allotments made by the Bureau of War Risk Insurance to the Board of Managers of the National Home for Disabled Volunteer Soldiers for the care of beneficiaries of that bureau by said board shall also be available for expenditure by the board on that account at such of the homes and for such of the objects of expenditure at such homes as are hereinbefore enumerated, including the sums allotted for alteration and improvement of existing facilities so as to provide adequate accommodations for the beneficiaries of the Bureau of War Risk Insurance. *Act of June 5, 1920 (41 Stat. 906), making appropriations for sundry civil expenses: National Home for Disabled Volunteer Soldiers.*

In regard to allotments see 2013, post.

Provision for the various expenses and branches of the home appears annually in the acts making appropriations for sundry civil expenses.

1983. Balance of pension due at death of veteran in National Home for Disabled Volunteer Soldiers.—Hereafter any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named, and should no widow, minor child, or dependent parent be discovered within one year from the time of the death of the pensioner, said balance shall be paid to the post fund of the Branch of said National Home of which the pensioner was a member at the time of his death, to be used for the common benefit of the members of the Home under the direction of the Board of Managers, subject to future reclamation by the relatives hereinbefore designated, upon application filed with the Board of Managers within five years after the pensioner's death. *Act of July 1, 1902 (32 Stat. 564).*

Notes of Decisions.

<p>Payment to post fund.—The Southern Branch Soldiers' Home was incorporated by Congress and is governed by regulations prescribed by its board of managers, and</p>	<p>in the case of a pensioner dying without leaving widow, minor child, or dependent mother or father, it is governed by this act. <i>O'Mara v. U. S. (1911), 47 Ct. Cl. 27.</i></p>
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1984. Disposition of personal property of a veteran after death in the National Home for Disabled Volunteer Soldiers.—Hereafter the application of any person for membership in the National Home for Disabled Volunteer Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of

Managers for the sole use and benefit of the post fund of said home, the proceeds to be disposed of and distributed among the several branches as may be ordered by said Board of Managers, and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. The Board of Managers is directed to so change the form of application for membership as to give reasonable notice of this provision to each applicant and as to contain the consent of the applicant to accept membership upon the conditions herein provided. *Sec. 1, act of June 25, 1910 (36 Stat. 786), making appropriations for sundry civil expenses.*

1985. Receipts from sales of property of the National Home for Disabled Volunteer Soldiers.—That all sums received from sales of subsistence stores or other property of the National Home for Disabled Volunteer Soldiers shall be taken up by the disbursing officer under the proper current appropriation and be available for disbursement on account of that appropriation. *Act of Aug. 18, 1894 (28 Stat. 412), making appropriations for sundry civil expenses.*

1986. Security for deposits of funds of the National Home for Disabled Volunteer Soldiers.—That from and after the passage of this act it shall be the duty of the Secretary of the Treasury to require from the president and cashier of all banks used as depositories by the treasurer of the Home a deposit of bonds sufficient in amount to fully secure all moneys pertaining to said Home left on deposit with any such bank. *Sec. 2, act of July 9, 1886 (24 Stat. 129).*

This section was part of an act to reimburse the home for losses incurred through the failure of a bank named in sec. 1, which is omitted, as temporary and executed.

1987. Expenditures by the National Home for Disabled Volunteer Soldiers.— * * * *Provided*, That all purchases of supplies exceeding the sum of one thousand dollars at any one time shall be made upon public tender after due advertisement, and that the expenditure for new buildings shall be expressly authorized in writing: * * * *Act of March 3, 1879 (20 Stat. 390) making appropriations for sundry civil expenses.*

1988. Supplies for the National Home for Disabled Volunteer Soldiers.— * * * Hereafter all supplies for the National Home for Disabled Volunteer Soldiers shall be purchased, shipped, and distributed as may be directed by the Board of Managers. *Act of July 1, 1898 (30 Stat. 640), making appropriations for sundry civil expenses,*

1989. Medical supplies for the National Home for Disabled Volunteer Soldiers.— That hereafter upon proper application therefor, the Medical Department of the Army is authorized to sell medical and hospital supplies at its contract prices to the National Home for Disabled Volunteer Soldiers; *Act of June 11, 1896 (29 Stat. 445), making appropriations for sundry civil expenses.*

1990. Funds of branches of the National Home for Disabled Volunteer Soldiers.— * * * *Provided*, That all amounts disbursed from the appropriation of a Branch Home shall be disbursed and accounted for monthly to the general treasurer by the treasurer of that Branch, except such expenditures for services, stationery, tableware, clothing and bedding as may be required by the Board of Managers to be legally made by the general treasurer, and all such stationery, tableware, clothing and bedding as may be required for each Branch Home shall be shipped directly from the place of purchase or manufacture to such Branch Home; and all disbursements shall be made in conformity with

sections thirty-six hundred and seventy-eight and thirty-six hundred and seventy-nine, Revised Statutes: *Provided further*, That the balance of the posthumous fund, including the amount invested in bonds pertaining to that fund, that may be in the hands of the treasurer of any Branch of the Home on July first, eighteen hundred and ninety-four, shall be transferred to the appropriation for "current expenses, eighteen hundred and ninety-five," of that Branch Home, and thereafter all receipts on account of the effects of deceased members shall be credited to the appropriation for "current expenses" of the fiscal year during which such amounts were received, and all repayments of such amounts shall be made from and charged to the like appropriation for the fiscal year in which such repayments shall be made. *Act of Aug. 18, 1894 (28 Stat. 411), making appropriations for sundry civil expenses.*

R. S. 3678, mentioned in this section, providing that appropriations should be applied to the objects for which made, is set forth 222, ante.

R. S. 3679, also mentioned in this section, providing that no sum should be expended, or contract involving future payment made, in excess of the appropriations for that fiscal year, is set forth 224, 35, 226, ante.

1991. Quarterly account rendered by the managers of the National Home for Disabled Volunteer Soldiers.—* * * And the managers of said home shall, at the commencement of each quarter of the year, render to the Secretary of War an account of all their receipts and expenditures for the quarter immediately preceding, with the vouchers for such expenditures; and all such accounts and vouchers shall be authenticated by the officers of said home thereunto duly appointed by said managers, and audited, and allowed, as required by law for the general appropriations and expenditures of the War Department. *Act of March 3, 1875 (18 Stat. 360), making appropriations for legislative, executive, and judicial expenses: War Department.*

1992. Supervision of accounts of the National Home for Disabled Volunteer Soldiers.—* * * *Provided*, That the accounts relating to the expenditure of said sums, as also all receipts by said home from whatever source, shall, in addition to the supervision now provided for, be reported to and supervised by the Secretary of War. *Act of March 3, 1891 (26 Stat. 984), making appropriations for sundry civil expenses.*

* * * and the Secretary of War shall hereafter exercise the same supervision over all receipts and disbursements on account of the volunteer soldiers' homes as he is required by law to apply to the accounts of disbursing officers of the Army. *Act of March 3, 1893 (27 Stat. 653), making appropriations to supply deficiencies.*

For requirements as to annual inspections of the home see ante, 546.

1993. Audit of accounts of the National Home for Disabled Volunteer Soldiers.—* * * *Provided*, That the accounts relating to the expenditure of all public moneys appropriated for the support and maintenance of the National Home for Disabled Volunteer Soldiers shall be audited by the Board of Managers of said Home in the same manner as is provided for the accounts of the various Departments of the United States Government, and thereupon immediately transmitted directly to the proper accounting officers of the Treasury Department for final audit and settlement. *Act of March 3, 1901 (31 Stat. 1178), making appropriations for sundry civil expenses.*

1994. Annual report of the National Home for Disabled Volunteer Soldiers.—* * * And hereafter there shall annually be submitted to the Secretary of War a detailed statement of the expenses of the Board of Managers of the

National Home for Disabled Volunteer Soldiers, who shall submit the same to Congress at the beginning of each session thereof. *Act of March 3, 1885 (23 Stat. 510), making appropriations for sundry civil expenses.*

* * * And hereafter the detailed statement of the expenses of the Board of Managers of the National Home for Disabled Volunteer Soldiers shall be reported direct to Congress in the annual report of the Board of Managers. But all of the expenditures of the said Home, including the expenses of the Board of Managers, shall be made subject to the general laws governing the disbursement of public moneys, so far as the same can be made applicable thereto, and shall be audited by the proper accounting officers of the Treasury, under such rules and regulations as may be prescribed by the Secretary of the Treasury: * * * *Act of March 3, 1887 (24 Stat. 539), making appropriations for sundry civil expenses.*

* * * *Provided*, That hereafter the statement of expenses of the Board of Managers of the National Home for Disabled Volunteer Soldiers shall each year be submitted in the annual book of estimates and shall be made to show the amount of salary or compensation paid to each of the officers and employees of said Board, and there shall also be submitted therewith a statement showing the number of officers appointed at each of the Branch Homes under Section four thousand eight hundred and twenty-nine of the Revised Statutes, the amount of salary or compensation paid to each, and the amount of allowance to each, if any, for contingent or other expenses. *Act of Aug. 5, 1892 (27 Stat. 384), making appropriations for sundry civil expenses.*

Previous provisions for including the estimates for the home in the estimates for the War Department, in connection with provisions relating to the disposal of unexpended balances of appropriations for the home, were made by 218, ante.

1995. Prohibition of intoxicants about branches of the National Home for Disabled Volunteer Soldiers.—*Provided*, That no part of the foregoing appropriations shall be expended for any purpose at any branch of the National Home for Disabled Volunteer Soldiers that maintains or permits to be maintained on its premises a bar, canteen, or other place where beer, wine, or other intoxicating liquors are sold. *Act of July 19, 1919 (41 Stat. 193), making appropriations for sundry civil expenses.*

1996. Headquarters of the National Home for Disabled Volunteer Soldiers.—The headquarters of the National Home for Disabled Volunteer Soldiers shall be established and hereafter maintained at the Central Branch, National Military Home, Ohio, and shall occupy for offices, without expenditure for rent, any general or post fund building. *Act of July 1, 1916 (39 Stat. 297), making appropriations for sundry civil expenses.*

1997. Location of branches of the National Home for Disabled Volunteer Soldiers.—The board of managers shall have authority to procure from time to time, at suitable places, sites for military homes for all persons serving in the Army of the United States at any time in the war of the rebellion, not otherwise provided for, who have been or may be disqualified for procuring their own support by reason of wounds received or sickness contracted while in the line of their duty during the rebellion; and to have the necessary buildings erected, having due regard to the health of location, facility of access, and capacity to accommodate the persons entitled to the benefits thereof. *R. S. 4830.*

Under authority conferred by separate statutes branch homes have been established at the following places:

The Central Branch, at Dayton, Ohio.

The Northwestern Branch, at Milwaukee, Wis. (See also notes to 1872, ante.)

The Eastern Branch, at Togus, Me.

The Southern Branch, at Hampton, Va.

The Western Branch, at Leavenworth, Kans. (See also notes to 1872, ante.)

The Pacific Branch, at Santa Monica, Calif.

The Marion Branch, at Marion, Ind.

The Danville Branch, at Danville, Ill.

The Mountain Branch, at Johnson City, Tenn.

Battle Mountain Sanitarium, Hot Springs, S. Dak.

Act of June 12, 1917 (40 Stat. 140), provided as follows:

"The Secretary of War is authorized and directed to report to Congress, not later than January first, nineteen hundred and eighteen, what branch or branches of the National Home for Disabled Volunteer Soldiers, if any, can be discontinued without prejudice to the care of the persons entitled to admission to the home."

1998. Condemnation of sites for branches of the National Home for Disabled Volunteer Soldiers.—That the provisions of the Act entitled "An Act to authorize condemnation of land for sites of public buildings, and for other purposes," approved August first, eighteen hundred and eighty-eight, shall be construed to apply to the Board of Managers of the National Home for Disabled Volunteer Soldiers. *Act of July 19, 1897 (30 Stat. 181), making appropriations to supply deficiencies.*

Act of Aug. 1, 1888, mentioned in this section, authorized the condemnation of land for sites for public buildings. See 1922, ante.

1999. Appropriations for constructing branches of the National Home for Disabled Volunteer Soldiers.—That appropriations made for the fiscal year nineteen hundred, or that may hereafter be made, for the construction of buildings at any of the branches of the National Home for Disabled Volunteer Soldiers shall continue available until expended. *Act of June 6, 1900 (31 Stat. 294), making appropriations to supply deficiencies.*

Appropriations herein, or that may hereafter be made, for construction of buildings and appurtenances at any of the Branches of the National Home for Disabled Volunteer Soldiers, shall be available immediately after the approval of the Act continuing the same. *Act of March 3, 1903 (32 Stat. 1137), making appropriations for sundry civil expenses.*

2000. Repairs at branches of the National Home for Disabled Volunteer Soldiers.—* * * *Provided*, That no part of the appropriation for repairs for any of the branch homes shall be used for the construction of any new building; *Act of June 5, 1920 (41 Stat. 902), making appropriations for sundry civil expenses.*

Similar provisions appear in previous appropriation acts.

2001. Loan to Medical Department of the Southern Branch of the National Home for Disabled Volunteer Soldiers.—That jurisdiction and control over the Southern Branch of the National Home for Disabled Volunteer Soldiers, located at Hampton, Virginia, be, and the same hereby is, transferred for the period of the war from the Board of Managers of the National Home for Disabled Volunteer Soldiers to the Secretary of War for use by the Medical Department of the Army for hospital purposes.

SEC. 2. That upon the close of the war or as soon thereafter as may be practicable, the Secretary of War shall cause said home to be vacated by the Medical Department of the Army, and thereupon jurisdiction and control over said home shall revert to said Board of Managers of the National Home for Disabled Volunteer Soldiers.

Sec. 3. That the various items of appropriations heretofore or hereafter made for the support, maintenance, and other necessary expenses of said Southern Branch of the National Home for Disabled Volunteer Soldiers, be, and they hereby are, made available for payment of the cost of the transfer of the members of said home to other branches of the national home, and for the transfer of any property found to be necessary to transfer therefrom to other branches of the national home and for the support of the branches to which said members are transferred to the extent of the allotments thereof made by the said board of managers in consideration of and in the amount of an extra expense incurred by reason of said transfers and for the retransfer from said branches to said Southern Branch of the persons and property transferred as aforesaid at such time as jurisdiction and control over said Southern Branch shall be reinvested in said board of managers in accordance with the provisions of section two of this Act. *Act of Nov. 7, 1918 (40 Stat. 1042), making appropriations for sundry civil expenses.*

2002. Aid to State homes.—That all States or Territories which have established, or which shall hereafter establish, State homes for disabled soldiers and sailors of the United States who served in the Civil War or in any previous or subsequent war who are disabled by age, disease, or otherwise, and by reason of such disability are incapable of earning a living, provided such disability was not incurred in service against the United States, shall be paid for every such disabled soldier or sailor who may be admitted and cared for in such home at the rate of \$120 per annum.

The number of such persons for whose care any State or Territory shall receive the said payment under this Act shall be ascertained by the Board of Managers of the National Home for Disabled Volunteer Soldiers under such regulations as it may prescribe, but the said State or Territorial homes shall be exclusively under the control of the respective State or Territorial authorities, and the board of managers shall not have nor assume any management or control of said State or Territorial homes.

The board of managers of the national home shall, however, have power to have the said State or Territorial homes inspected at such times as it may consider necessary, and shall report the result of such inspections to Congress in its annual report: *Provided*, That no State shall be paid a sum exceeding one-half the cost of maintenance of each soldier or sailor by such State: *Provided further*, That one-half of any sum or sums retained by State homes on account of pensions received from inmates shall be deducted from the aid herein provided for. That no money shall be apportioned to any State or Territorial home that maintains a bar or canteen where intoxicating liquors are sold: *Provided further*, That for any sum or sums collected in any manner from inmates of such State or Territorial homes to be used for the support of said homes a like amount shall be deducted from the aid herein provided for, but this proviso shall not apply to any State or Territorial home into which the wives or widows of soldiers are admitted and maintained. *Sec. 1, act of Aug. 27, 1888 (25 Stat. 450), as amended by act of Jan. 27, 1920 (41 Stat. 399).*

State and Territorial homes for disabled soldiers and sailors: For continuing aid to State or Territorial homes for the support of disabled volunteer soldiers, in conformity with the Act approved August 27, 1888, as amended, including all classes of soldiers admissible to the National Home for Disabled Volunteer Soldiers, \$900,000: *Provided*, That for any sum or sums collected in

any manner from inmates of such State or Territorial homes to be used for the support of said homes a like amount shall be deducted from the aid herein provided for, but this proviso shall not apply to any State or Territorial home into which the wives or widows of soldiers are admitted and maintained. *Act of Mar. 4, 1921 (41 Stat. 1396), making appropriations for sundry civil expenses.*

Appropriation acts of previous years have contained a proviso to prevent aid to State homes where intoxicants were sold.

CHAPTER 31.

CARE OF THE SICK AND INSANE.

Provision for medical treatment:

- Soldiers, 2003.
- Families of soldiers, 2004.
- Contagious diseases, 2005.

Hospital care of soldiers:

- At Hot Springs, Ark., 2006.
- Rules for patients, 2007.
- At Fort Bayard, N. Mex., 2008.
- Rules for patients, 2009.

In hospitals of Public Health Service, 2010.

In private hospital, 2011.

Canal Zone garrisons, 2012.

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In Porto Rico, 2058.

Prisoners of war and interned aliens, 2059.

Transfer of patients from military hospitals to public hospitals, 2060.

Interdepartmental Social Hygiene Board:

Established, 2061.

States assisted in care of venereal patients, 2062.

Research, 2063.

2003. Provision for medical treatment of soldiers.— * * * for medical care and treatment not otherwise provided for, * * * for the pay of civilian physicians employed to examine physically applicants for enlistment and enlisted men and to render other professional services from time to time

under proper authority; * * * *Act of June 5, 1920 (41 Stat. 967-968), making appropriations for the support of the Army: Medical Department.*

Similar provision appears in previous appropriation acts.

For regulations concerning medical attendance of soldiers see A. R. 1452 and 1453.

2004. Medical treatment of the families of soldiers.— * * * *Provided, That the medical officers of the Army and contract surgeons shall whenever practicable attend the families of the officers and soldiers free of charge. Act of July 5, 1884 (23 Stat. 112), making appropriations for the support of the Army: Medical Department.*

2005. Prevention and treatment of contagious diseases.—For * * * supplies required for mosquito destruction in and about military posts in the Canal Zone, * * * for the proper care and treatment of epidemic and contagious diseases in the Army or at military posts or stations, including measures to prevent the spread thereof, * * * *Act of June 5, 1920 (41 Stat. 967), making appropriations for the support of the Army: Medical Department.*

Similar provisions appear in previous appropriation acts.

2006. Army and Navy hospital at Hot Springs, Ark.— * * * Army and Navy hospital at Hot Springs, Arkansas, which shall be erected by and under the direction of the Secretary of War, in accordance with plans and specifications to be prepared and submitted to the Secretary of War by the Surgeons-General of the Army and Navy; which hospital, when in a condition to receive patients, shall be subject to such rules, regulations, and restrictions as shall be provided by the President of the United States: *Provided further, That such hospital shall be erected on the Government reservation at or near Hot Springs, Arkansas. Act of June 30, 1882 (22 Stat. 121), making appropriations for the support of the Army.*

The Army and Navy hospital at Hot Springs, Ark., was erected on a Government reservation, pursuant to this act. Provision for the supply of the Army and Navy at this hospital has been regularly included in appropriations for the Medical and Hospital Department in support of the Army acts.

2007. Rules for patients in the Army and Navy Hospital at Hot Springs, Ark.— * * * *Provided, That hereafter all persons admitted to treatment in the Army and Navy General Hospital at Hot Springs, Arkansas, shall, while patients in said hospital, be subject to the rules and articles for the government of the armies of the United States; * * * Act of March 3, 1909 (35 Stat. 748), making appropriations for the support of the Army.*

2008. Hospital at Fort Bayard, New Mexico.— * * * *Provided further, That the hospital at Fort Bayard, New Mexico, for the treatment of tuberculosis, shall be opened to the treatment of the officers and men of the Navy and Marine Corps. Act of March 2, 1907 (34 Stat. 1172), making appropriations for the support of the Army.*

2009. Rules for patients at Fort Bayard.— * * * *Provided further, That all persons admitted to treatment in the general hospital at Fort Bayard, New Mexico, shall, while patients in said hospital, be subject to the rules and articles for the government of the armies of the United States: * * * Act of June 12, 1906 (34 Stat. 255), making appropriations for the support of the Army.*

2010. Hospitals of the Public Health Service open to the Army and seamen.—That the Secretary of the Treasury be, and he is hereby, authorized to provide immediate additional hospital and sanatorium facilities for the care and treatment of discharged sick and disabled soldiers, sailors, and marines, Army and Navy nurses (male and female), patients of the War Risk Insurance Bureau, and the following persons only: Merchant marine seamen, seamen on boats of the Mississippi River Commission, officers and enlisted men of the United States Coast Guard, officers and employees of the Public Health Service, certain keepers and assistant keepers of the United States Lighthouse Service, seamen of the Engineer Corps of the United States Army, officers and enlisted men of the United States Coast and Geodetic Survey, civilian employees entitled to treatment under the United States Employees' Compensation Act, and employees on Army transports not officers or enlisted men of the Army, now entitled by law to treatment by the Public Health Service. *Sec. 1, act of Mar. 3, 1919 (40 Stat. 1302).*

The above statute authorized the Secretary of the Treasury to contract for the use of hospitals, also to purchase and construct hospitals. The act of Mar. 4, 1921 (41 Stat. 1364), authorized the Secretary of the Treasury to provide additional hospital and outpatient dispensary facilities for persons who served in the World War and became patients of the Bureau of War Risk Insurance or of the Federal Board for Vocational Education, Rehabilitation Division, and appropriated \$13,600,000.

2011. Medical care in private hospitals.— * * * for medical care and treatment not otherwise provided for, including care and subsistence in private hospitals, of officers, enlisted men, and civilian employees of the Army, of applicants for enlistment, and of prisoners of war and other persons in military custody or confinement, when entitled thereto by law, regulation, or contract: *Provided further*, That this shall not apply to officers and enlisted men who are treated in private hospitals or by civilian physicians while on furlough; * * * *Act of June 5, 1920 (41 Stat. 967), making appropriations for the support of the Army: Medical Department.*

Similar provision appears in previous appropriation acts.

2012. Hospital care of Canal Zone garrisons.—For paying the Panama Canal such reasonable charges, exclusive of subsistence, as may be approved by the Secretary of War for caring in its hospitals for officers, enlisted men, military prisoners, and civilian employees of the Army admitted thereto upon the request of proper military authority, \$60,000: *Provided*, That the subsistence of the said patients, except commissioned officers, shall be paid to said hospitals out of the appropriation for subsistence of the Army at the rates provided therein for commutation of rations for enlisted patients in general hospitals. *Act of June 5, 1920 (41 Stat. 968), making appropriations for the support of the Army: Hospital care, Panama Canal Garrison.*

Similar provision appears in previous appropriation acts.

2013. Medical attention for disabled soldiers.—In addition to the compensation above provided, the injured person shall be furnished by the United States such reasonable governmental medical, surgical, and hospital services and with such supplies, including wheeled chairs, artificial limbs, trusses, and similar appliances, as the director may determine to be useful and reasonably necessary, which wheeled chairs, artificial limbs, trusses, and similar appliances may be procured by the Bureau of War Risk Insurance in such manner, either by purchase or manufacture, as the director may determine to be advantageous and reasonably necessary: * * * *Sec. 302 (6), added to the act of Sept. 2,*

1914, by sec. 5, act of Oct. 6, 1917 (40 Stat. 406), as amended by sec. 11, act of Dec. 24, 1919 (41 Stat. 574).

Medical and Hospital Services: For medical, surgical, and hospital services, medical examinations, funeral expenses, traveling expenses, and supplies, and not exceeding \$100,000 for library books, magazines, and papers, for beneficiaries of the Bureau of War Risk Insurance, including court costs and other expenses incident to proceedings heretofore or hereafter taken for commitment of mentally incompetent persons to hospitals for the care and treatment of the insane, \$33,000,000: *Provided*, That no part of the money hereby appropriated shall be used for the payment of commutation of quarters, subsistence and laundry or quarters, heat and light and longevity to any employee other than the commissioned medical officers provided for by statute. This appropriation shall be disbursed by the Bureau of War Risk Insurance, and such portion thereof as may be necessary shall be allotted from time to time to the Public Health Service, the Board of Managers of the National Home for Disabled Volunteer Soldiers, and the War and Navy Departments, and transferred to their credit for disbursement by them for the purposes set forth in this paragraph. The allotments to the said Board of Managers shall also include such sums as may be necessary to alter, improve, or provide facilities in the several branches under its jurisdiction so as to furnish adequate accommodations for such beneficiaries of the Bureau of War Risk Insurance as may be committed to its care. * * *

The allotments made to the War and Navy Departments shall be available for expenditure under the various headings of appropriations made to said departments as may be necessary. *Act of Mar. 4, 1921 (41 Stat. 1374), making appropriations for sundry civil expenses: Bureau of War Risk Insurance.*

As originally enacted sec. 302 (6) was as follows:

"In addition to the compensation above provided, the injured person shall be furnished by the United States such reasonable governmental medical, surgical, and hospital services and with such supplies, including artificial limbs, trusses, and similar appliances, as the director may determine to be useful and reasonably necessary: * * *

2014. Hospital care in training camps.—The Secretary of War is hereby authorized * * * and to admission to military hospitals at such camps, and to furnish medical attendance and supplies, * * * *Sec. 47a, added to the act of June 3, 1916, by sec. 34, act of June 4, 1920 (41 Stat. 778).*

The language of this part of this section is obscure. The intent seems to be to make provision for admission of members of the Reserve Officers' Training Corps to military hospitals at such camps.

2015. Medical attention for aliens discharged from the United States Army.—That the President of the United States is hereby authorized and empowered to make provision for such care and treatment as he may deem advisable of persons discharged from the military or naval forces of the United States on account of physical disability who are citizens of any nation at war with a nation with which the United States is at war; but such provision shall be made only for the citizens of a nation that makes suitable provision for the care and treatment of persons discharged from the military or naval forces on account of physical disability who are citizens of the United States: *Provided*, That such care and treatment shall in no case exceed the care and treatment authorized by law and regulations for members of the Army and Navy of the United States discharged from the military or naval service for like cause. *Chap. VIII, act of July 9, 1918 (40 Stat. 881), making appropriations for the support of the Army.*

2016. Medical attention for disabled veterans of cobelligerent nations.—That the Bureau of War Risk Insurance is hereby authorized to furnish transportation, also the medical, surgical, and hospital services and the supplies and appliances provided by subdivision (6) hereof, to discharged members of the military or naval forces of those Governments which have been associated in war with the United States since April 6, 1917, and come within the provisions of laws of such Governments similar to the War Risk Insurance Act, at such rates and under such regulations as the Director of the Bureau of War Risk Insurance may prescribe; and the Bureau of War Risk Insurance is hereby authorized to utilize the similar services, supplies, and appliances provided for the discharged members of the military and naval forces of those Governments which have been associated in war with the United States since April 6, 1917, by the laws of such Governments similar to the War Risk Insurance Act, in furnishing the discharged members of the military and naval forces of the United States who live within the territorial limits of such Governments and come within the provisions of subdivision (6) hereof, with the services, supplies, and appliances provided for in such subdivision; and any appropriations that have been or may hereafter be made for the purpose of furnishing the services, supplies, and appliances provided for by subdivision (6) hereof are hereby made available for the payment to such Governments or their agencies for the services, supplies, and appliances so furnished at such rates and under such regulations as the Director of the Bureau of War Risk Insurance may prescribe. *Sec. 302(9), added to the act of Sept. 2, 1914, by sec. 11, act of Dec. 24, 1919 (41 Stat. 374).*

2017. Hospital diet.—Such quantities of fresh or preserved fruits, milk, butter, and eggs as may be necessary for the proper diet of the sick, may be allowed in hospitals. They shall be provided under such rules as the Surgeon-General, with the approval of the Secretary of War, shall prescribe. *R. S. 1175.*

Act of Feb. 26, 1900 (31 Stat. 212), provided for an addition to the ration in the case of patients in hospital who are too sick to be subsisted on the Army ration, and for a similar increase in case of enlisted men in camp during recovery from low conditions of health, consequent upon service in unhealthy regions or in debilitating climates, which may be regarded as temporary legislation.

2018. Hospital supplies, etc., imported without duty by the American National Red Cross.—That during the continuance of the state of war now existing, and during the period of one year thereafter, there may be imported into the United States free of the payment of any import duty any articles of clothing, medicines, drugs, hospital supplies and equipment, goods, wool and cotton, and the products thereof, donated by any person or persons abroad and consigned to the American National Red Cross: *Provided*, That such articles or supplies are not to be sold but are only to be donated or used by it solely to or for the benefit of the land or naval forces of the United States or of the allies of the United States, or for the relief of the civilian population of the United States or any of its said allies. *Sec. 1, act of Aug. 31, 1918 (40 Stat. 954).*

That the Secretary of the Treasury shall prescribe such regulations as may be necessary to carry this Act into effect. *Sec. 2, act of Aug. 31, 1918 (40 Stat. 954).*

2019. Disposal of articles produced by patients in hospitals.— * * * *Provided*, That the Secretary of the Treasury is authorized to make regulations governing the disposal of articles produced by patients in the course of their curative treatment, either by allowing the patient to retain same or by selling the articles and depositing the money received to the credit of the appropriation

from which the materials for making the articles were purchased. *Act of Mar. 6, 1920 (41 Stat. 507).*

2020. Artificial limbs and appliances.—That every officer, soldier, seaman and marine, who, in the line of duty, in the military or naval service of the United States, shall have lost a limb, or sustained bodily injuries, depriving him of the use of any of his limbs, shall receive once every five years an artificial limb or appliance, or commutation therefor, as provided and limited by existing laws, under such regulations as the Surgeon-General of the Army may prescribe; and the period of five years shall be held to commence with the filing of the first application after the seventeenth day of June, in the year eighteen hundred and seventy. *Sec. 1, act of Aug. 15, 1878 (19 Stat. 803).*

* * * *Provided, That the Surgeon General of the Army is authorized to pay not exceeding \$125 for each artificial limb or apparatus for resection furnished in kind hereafter under the provisions of section 4787, Revised Statutes, as amended. Act of June 5, 1920 (41 Stat. 901), making appropriations for sundry civil expenses: Medical Department.*

Artificial limbs: For furnishing artificial limbs and apparatus, or commutation therefor, and necessary transportation, \$50,000. *Act of Mar. 3, 1921 (41 Stat. 1392), making appropriations for sundry civil expenses: Medical Department.*

2021. Artificial limbs and appliances for veterans of the Civil War.—Every officer, soldier, seaman, and marine who was disabled during the war for the suppression of the rebellion, in the military or naval service, and in the line of duty, or in consequence of wounds received or disease contracted therein, and who was furnished by the War Department since the seventeenth day of June, eighteen hundred and seventy, with an artificial limb or apparatus for resection, who was entitled to receive such limb or apparatus since said date, shall be entitled to receive a new limb or apparatus at the expiration of every three years thereafter, under such regulations as have been or may be prescribed by the Surgeon-General of the Army. *R. S. 4787, as amended by act of Mar. 3, 1891 (26 Stat. 1103).*

Notes of Decisions.

Construction and operation.—The amendment substituting "three years" for "five years" was not retrospective, so as to entitle a person who had been receiving commutation money at intervals of five years to back pay equivalent to the same sums at three-year intervals. *Fuller v. U. S. (D. C. 1891), 48 Fed. 654.*

When due application has been made under the statute and the regulations made by the Surgeon General, the applicant becomes entitled to an artificial limb or the money commutation therefor, and every five years thereafter he is entitled to another artificial limb or the money value thereof; for the word "thereafter" only indicates the time when the period

fixed in the statute begins to run in favor of the applicant. *Id.*

Commutation for an artificial limb or apparatus is demandable under this section every three years instead of five, and the money commutation for such limb or apparatus, under 2023, post, is also demandable every three years, which periods run from the dates when such artificial limb was furnished, and not from June 17, 1870. (1891) 20 Op. Atty. Gen. 63.

Expenditure of appropriation.—The appropriation of \$175,000 for artificial limbs, etc., made by the act of Mar. 3, 1881 (21 Stat. 435, 447), should be expended under the direction of the War Department. (1881) 17 Op. Atty. Gen. 233.

2022. Transportation to have artificial limbs fitted.—The Secretary of War is authorized and directed to furnish to the persons embraced by the provisions of section forty-seven hundred and eighty-seven, transportation to and from

their homes and the place where they may be required to go to obtain artificial limbs provided for them under authority of law. *R. S. 4791.*

Section forty-seven hundred and ninety-one is amended by adding at the end of the section the following:

"The transportation allowed for having artificial limbs fitted shall be furnished by the Quartermaster-General of the Army, the cost of which shall be refunded from the appropriations for invalid pensions." *Act of Feb. 27, 1877 (19 Stat. 252), amending R. S. 4791.*

That necessary transportation to have artificial limbs fitted shall be furnished by the Quartermaster-General of the Army, the cost of which shall be refunded out of any money appropriated for the purchase of artificial limbs: *Provided* That this act shall not be subject to the provisions of an act entitled "An act to increase pensions," approved June eighteenth, eighteen hundred and seventy-four. *Sec. 2, act of Aug. 15, 1876 (19 Stat. 204).*

For *R. S. 4787*, see 2021, ante.

Section 2, above, has never been expressly repealed; but see 2020, ante.

2023. Commutation for artificial limbs.—Every person entitled to the benefits of the preceding section may, if he so elects, receive, instead of such limb or apparatus, the money value thereof, at the following rates, namely: For artificial legs, seventy-five dollars; for arms, fifty dollars; for feet, fifty dollars; for apparatus for resection, fifty dollars. *R. S. 4788.*

Every person in the military or naval service who lost a limb during the war of the rebellion, but from the nature of his injury is not able to use an artificial limb, shall be entitled to the benefits of section forty-seven hundred and eighty-eight, and shall receive money commutation as therein provided. *R. S. 4790.*

Section forty-seven hundred and ninety is amended by inserting, in the second line, after the word "rebellion," the words "or is entitled to the benefits of section forty-seven hundred and eighty-seven". *Act of Feb. 27, 1877 (19 Stat. 252), amending R. S. 4790.*

For *R. S. 4787*, see 2021, ante.

Provision for artificial limbs and appliances, or commutation therefor, has been made annually in appropriations for the Medical Department appearing in the sundry civil act. The appropriation for the fiscal year 1921 was by act of June 5, 1920 (41 Stat. 901).

2024. Payment of commutation for artificial limbs.—The Surgeon-General shall certify to the Commissioner of Pensions a list of all soldiers who elect to receive money commutation instead of limbs or apparatus, with the amount due to each, and the Commissioner of Pensions shall cause the same to be paid to such soldiers in the same manner as pensions are paid. *R. S. 4789.*

* * * and hereafter in case of commutation the money shall be paid directly to the soldier, sailor, or marine, and no fee or compensation shall be allowed or paid to any agent or attorney. *Act of March 3, 1891 (26 Stat. 979), making appropriations for sundry civil expenses.*

The provisions of *R. S. 4789* for payment by the Commissioner of Pensions of money commutation were superseded by ante, 2020.

2025. Surgical appliances for disabled veteran soldiers.—Appliances for disabled soldiers: For furnishing surgical appliances to persons disabled in the military or naval service of the United States, prior to April 6, 1917, and not

entitled to artificial limbs or trusses for the same disabilities, \$750. *Act of Mar. 4, 1921 (41 Stat. 1392), making appropriations for sundry civil expenses: Medical Department.*

2026. Trusses.—That every soldier of the Union Army, of petty-officer, seaman, or marine in the naval service, who was ruptured while in the line of duty during the late war for the suppression of the rebellion, or who shall be so ruptured thereafter in any war, shall be entitled to receive a single or double truss of such style as may be designated by the Surgeon-General of the United States Army as best suited for such disability; and whenever the said truss or trusses so furnished shall become useless from wear, destruction, or loss, such soldier, petty-officer, seaman, or marine shall be supplied with another truss on making a like application as provided for in section two of the original act of which this is an amendment: *Provided*, That such application shall not be made more than once in two years and six months: *And provided further*, That sections two and three of the said act of May twenty-eighth, eighteen hundred and seventy-two, shall be construed so as to apply to petty-officers, seamen, and marines of the naval service, as well as to soldiers of the Army. *Sec. 1, act of May 28, 1872 (17 Stat. 164), as amended by act of Mar. 3, 1879 (20 Stat. 353).*

R. S. 1176, which incorporated the act of May 28, 1872, was superseded by the above amendment.

Notes of Decisions.

Design of trusses.—Congress designed to furnish soldiers of the Union Army, who were ruptured while in the line of duty, with the best truss that could be procured, but left it discretionary with the Surgeon General to adopt one style, or different

styles, always keeping in view, however, the selection of that which in his judgment is best adapted to the particular case for which it is intended. (1872), 14 Op. Atty. Gen. 72.

2027. Application for trusses.—Application for such truss shall be made by the ruptured soldier, to an examining surgeon for pensions, whose duty it shall be to examine the applicant, and when found to have a rupture or hernia, to prepare and forward to the Surgeon-General an application for such truss without charge to the soldier. *R. S. 1177.*

See also 2026, ante.

2028. Purchase of trusses.—The Surgeon-General is authorized and directed to purchase the trusses required for such soldiers at wholesale prices, and the cost of the same shall be paid upon the requisition of the Surgeon-General out of any moneys in the Treasury not otherwise appropriated. *R. S. 1178.*

Trusses for disabled soldiers: For trusses for persons entitled thereto under section 1178, Revised Statutes of the United States, and the Act amendatory thereof, approved March 3, 1879, \$1,000. *Act of Mar. 3, 1921 (41 Stat. 1392), making appropriations for sundry civil expenses: Medical Department.*

So much of this section as makes a permanent indefinite appropriation to purchase trusses for soldiers was repealed by a provision of sec. 1, act of May 27, 1908, 215, ante. See also 2026, ante.

2029. Definition for the Vocational Rehabilitation Act.—That this Act shall be known as the Vocational Rehabilitation Act. That the word "board," as hereinafter used in this Act, shall mean the "Federal Board for Vocational Education." That the word "bureau," as hereinafter used in this Act, shall mean the "Bureau of War-Risk Insurance." *Sec. 1, act of June 27, 1918 (40 Stat. 617).*

2030. Persons entitled to vocational rehabilitation.—That every person enlisted, enrolled, drafted, inducted, or appointed in the military or naval forces of the United States, including members of training camps authorized by law, who, since April 7, 1917, has resigned or has been discharged or furloughed therefrom under honorable conditions, having a disability incurred, increased, or aggravated while a member of such forces, or later developing a disability traceable in the opinion of the board to service with such forces, and who, in the opinion of the Federal Board for Vocational Education, is in need of vocational rehabilitation to overcome the handicap of such disability, shall be furnished by the said board, where vocational rehabilitation is feasible, such course of vocational rehabilitation as the board shall prescribe and provide. * * * *Sec. 2, act of June 27, 1918 (40 Stat. 617), as amended by act of July 11, 1919 (41 Stat. 159).*

* * * *Provided further,* That no person who has been declared eligible for training under the provisions of the Vocational Rehabilitation Act, for whom training has been prescribed, and who has been notified by the board to begin training shall be eligible to the benefits of said Act in the event of his failure to commence training within a reasonable time after notice has been sent such person by the board: *Provided further,* That except when such failure is due, in the opinion of the board, to physical incapacity, such time shall not be longer than twelve months after the passage of this Act for persons already declared eligible and notified to begin training, and twelve months after notice is given for persons hereafter declared eligible and notified to begin training. *Act of Mar. 4, 1921 (41 Stat. 1379-1380), making appropriations for sundry civil expenses: Federal Board for Vocational Education.*

2031. Vocational rehabilitation of patients in hospitals.— * * * Whenever training is employed as a therapeutic measure by the War Department or the Navy Department a plan may be established between these agencies and the board acting in an advisory capacity to insure, in so far as medical requirements permit, a proper process of training and the proper preparation of instructors for such training. * * * *Sec. 6, act of June 27, 1918 (40 Stat. 618).*

2032. Courses in vocational rehabilitation.— * * * The board shall have the power, and it shall be its duty, to furnish the persons included in this section suitable courses of vocational rehabilitation, to be prescribed and provided by the board; * * * *Sec. 2, act of June 27, 1918 (40 Stat. 617), as amended by act of July 11, 1919 (41 Stat. 159).*

That the board shall have the power and it shall be its duty to provide such facilities, instructors, and courses as may be necessary to insure proper training for such persons as are required to follow such courses as herein provided; to prescribe the courses to be followed by such persons; to pay, when in the discretion of the board such payment is necessary, the expense of travel, lodging, subsistence, and other necessary expenses of such persons while following the prescribed courses; to do all things necessary to insure vocational rehabilitation; to provide for the placement of rehabilitated persons in suitable or gainful occupations. * * * *Sec. 4, act of June 27, 1918 (40 Stat. 618).*

2033. Regulations by the Federal Board of Vocational Education.— * * * The board shall have the power to make such rules and regulations as may be necessary for the proper performance of its duties as prescribed by this Act, * * * *Sec. 4, act of June 27, 1918 (40 Stat. 618).*

2034. Placement of rehabilitated persons.— * * * and is hereby authorized and directed to utilize, with the approval of the Secretary of Labor, the facilities of the Department of Labor, in so far as may be practicable, in the placement of rehabilitated persons in suitable or gainful occupations. *Sec. 4, act of June 27, 1918 (40 Stat. 618).*

2035. Cooperation between the board and the War Department.— * * * The board shall, in establishing its plans and rules and regulations for vocational training, cooperate with the War Department and the Navy Department in so far as may be necessary to effect a continuous process of vocational training. *Sec. 6, act of June 27, 1918 (40 Stat. 619).*

2036. Medical and surgical treatment of vocational students.—That all medical and surgical work or other treatment necessary to give functional and mental restoration to disabled persons prior to their discharge from the military or naval forces of the United States shall be under the control of the War Department and the Navy Department, respectively. * * * A plan may also be established between the War and Navy Departments and the board whereby these departments shall act in an advisory capacity with the board in the care of the health of the soldier and sailor after his discharge. * * * *Sec. 6, act of June 27, 1918 (40 Stat. 618).*

2037. Vocational rehabilitation without cost for instruction.—That the courses of vocational rehabilitation provided for under this Act shall, as far as practicable and under such conditions as the board may prescribe, be made available without cost for instruction for the benefit of any person who is disabled under circumstances entitling him, after discharge from the military or naval forces of the United States, to compensation under Article III of said Act and who is not included in section two hereof. *Sec. 3, act of June 27, 1918 (40 Stat. 618).*

2038. Maintenance of vocational students.— * * * and every person electing to follow such a course of vocational rehabilitation shall, while following the same, be paid monthly by the said board from the appropriation hereinafter provided such sum as in the judgment of the said board is necessary for his maintenance and support and for the maintenance and support of persons depending upon him, if any: * * * *Sec. 2, act of June 27, 1918 (40 Stat. 617), as amended by act of July 11, 1919 (41 Stat. 159).*

* * * *Provided further,* That the board may, after June 30, 1920, pay, subject to the conditions and limitations prescribed by section 2 of the Vocational Rehabilitation Act as amended, to all trainees undergoing training under said section residing where maintenance and support is above the average and comparatively high, in lieu of the monthly payments for maintenance and support prescribed by section 2, as amended, such sum as in the judgment of the said board is necessary for his maintenance and support and for the maintenance and support of persons dependent upon him, if any: *Provided, however,* That in no event shall the sum so paid such person while pursuing such course be more than \$100 per month for a single man without dependents, or for a man with dependents \$120 per month, plus the several sums prescribed as family allowances under section 204 of Article II of the War Risk Insurance Act. *Act of June 5, 1920 (41 Stat. 1021), making appropriations to supply deficiencies.*

The maximum amounts previously allowed were \$80 for a single man and \$100 for a man with dependents.

2039. Compensation omitted or reduced during vocational rehabilitation.—
 * * * No compensation under Article III of the Act entitled "An Act to amend an Act entitled 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,'" approved October 6, 1917, shall be paid for the period during which any such person is being furnished by said board a course of vocational rehabilitation and support as herein authorized: *Provided, however,* That in the event any person pursuing a course of vocational rehabilitation is entitled under said Article III to compensation in an amount in excess of the payments made to him by the said board for his support and the support of his dependents, if any, the Bureau of War Risk Insurance shall pay monthly to such person such additional amount as may be necessary to equal the total compensation due under said Article III of said Act. *Sec. 2, act of June 27, 1918 (40 Stat. 618), as amended by act of July 11, 1919 (41 Stat. 159).*

2040. Reports upon vocational rehabilitation and placement for students.—That it shall also be the duty of the board to make or cause to have made studies, investigations, and reports regarding the vocational rehabilitation of disabled persons and their placement in suitable or gainful occupations. When the board deems it advisable, such studies, investigations, and reports may be made in cooperation with or through other departments and bureaus of the Government, and the board in its discretion may cooperate with such public or private agencies as it may deem advisable in performing the duties imposed upon it by this Act. *Sec. 5, act of June 27, 1918 (40 Stat. 618).*

2041. Special fund for vocational rehabilitation.—That the board is hereby authorized and empowered to receive such gifts and donations from either public or private sources as may be offered unconditionally. All moneys received as gifts or donations shall be paid into the Treasury of the United States, and shall constitute a permanent fund, to be called the "Special fund for vocational rehabilitation," to be used under the direction of the said board, in connection with the appropriations hereby made or hereafter to be made, to defray the expenses of providing and maintaining courses of vocational rehabilitation; and a full report of all gifts and donations offered and accepted, and all disbursements therefrom, shall be submitted annually to Congress by said board. *Sec. 7, act of June 27, 1918 (40 Stat. 619).*

Sec. 214 (11), act of Feb. 24, 1919 (40 Stat. 1068), provided as follows:

"Contributions or gifts made within the taxable year to * * * the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act, to an amount not in excess of 15 per centum of the taxpayer's net income as computed without the benefit of this paragraph. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. In the case of a nonresident alien individual this deduction shall be allowed only as to contributions or gifts made to domestic corporations, or to such vocational rehabilitation fund."

Additions were made to the above permanent fund and conditions of expenditure laid down in subsequent appropriation acts for deficiencies and sundry civil expenses in providing for the Federal Board for Vocational Education.

2042. Application of the special fund for vocational rehabilitation.—That the special fund for vocational education, authorized by section seven of the vocational rehabilitation Act, approved June twenty-seventh, nineteen hundred and eighteen, together with the items of appropriations made by said Act, are hereby made available, in addition to the purposes therein prescribed, for such other expenses as in the discretion of the board is deemed necessary and proper for the

payment of necessary travel, lodging, subsistence, and other expenses of disabled men while under investigation by the board to determine their eligibility for training under the Act, and the purchase of supplies, equipment, and clothing for disabled men when ready to enter employment, and the traveling expenses of such men to place of employment and for supplementing any or all of the other items of appropriation made by said Act. *Act of Feb. 26, 1919 (40 Stat. 1179).*

2043. Saint Elizabeths Hospital established.—There shall be in the District of Columbia a Government Hospital for the Insane, and its objects shall be the most humane care and enlightened curative treatment of the insane of the Army and Navy of the United States and of the District of Columbia. *R. S. 4838.*

After the passage of this Act the Government Hospital for the Insane shall be known and designated as Saint Elizabeths Hospital. *Act of July 1, 1916 (39 Stat. 309), making appropriations for sundry civil expenses.*

Notes of Decisions.

Hospital as a charitable institution.—The Government Hospital for the Insane is a charitable or eleemosynary institution, within act June 6, 1909, creating a Board of Charities for the District of Columbia, and such board has general supervision over it, and, under the order of the District Com-

missioners, has power of investigation with the duty of submitting a report and recommendation to Congress, but with this exception, the powers and duties of the Secretary of the Interior remain unchanged by the act. (1900), 23 Op. Atty. Gen. 287.

2044. Site of Saint Elizabeths Hospital.—The Secretary of War is authorized to grant a revocable permit to the Saint Elizabeths Hospital for the use of such portions of land as are at present not under lease and such other portions thereof as leases thereof expire, of that portion of land lying along Anacostia Flats which has been reclaimed by the War Department and is valuable for farming purposes. *Act of Oct. 6, 1917 (40 Stat. 573).*

2045. Officers of Saint Elizabeths Hospital.—The chief executive officer of the Government Hospital for the Insane shall be a superintendent, who shall be appointed by the Secretary of the Interior, shall be entitled to a salary of four thousand dollars a year, and shall give bond for the faithful performance of his duties in such sum and with such securities as may be required by the Secretary of the Interior. The superintendent shall be a well-educated physician, possessing competent experience in the care and treatment of the insane; he shall reside on the premises and devote his whole time to the welfare of the institution; he shall, subject to the approval of the board of visitors, appoint a responsible disbursing agent for the institution, who shall give a bond satisfactory to the Secretary of the Interior, and the said superintendent shall engage and discharge all needful and useful employees in the care of the insane and all laborers on the farm and determine their wages and duties; he shall also be an ex officio secretary of the board of visitors. * * * *R. S. 4839, as amended by sec. 1, act of Feb. 2, 1909 (35 Stat. 592).*

"The salary of the superintendent of the hospital is hereby fixed at five thousand dollars per annum." *Act of Mar. 4, 1911 (36 Stat. 1422).*

2046. Funds of Saint Elizabeths Hospital.—For support, clothing, and treatment in Saint Elizabeths Hospital of the insane from the Army, Navy, Marine Corps, Coast Guard, inmates of the National Home for Disabled Volunteer Soldiers, persons charged with or convicted of crimes against the United States

who are insane, all persons who have become insane since their entry into the military and naval service of the United States, civilians in the quartermaster's service of the Army, persons transferred from the Canal Zone, who have been admitted to the hospital and who are indigent, including exchange, maintenance, repair, and operation of motor-propelled passenger-carrying vehicles, for the use of the superintendent, purchasing agent, and general hospital business, not exceeding \$16,500; and not exceeding \$5,000 for the purchase, maintenance, repair, and operation of horse-drawn passenger-carrying vehicles for the general hospital business, \$1,000,000; and not exceeding \$1,500 of this sum may be expended in the removal of patients to their friends, not exceeding \$1,000 in the purchase of such books, periodicals, and papers as may be required for the purposes of the hospital and for the medical library, and not exceeding \$1,500 for actual and necessary expenses incurred in the apprehension and return to the hospital of escaped patients. *Act of Mar. 4, 1921 (41 Stat. 1408), making appropriations for sundry civil expenses: Saint Elizabeths Hospital.*

Similar provisions appear in previous appropriation acts.

2047. Disbursement of funds of Saint Elizabeths Hospital.— * * * The said disbursing agent, under the direction of the superintendent, shall have the custody of and pay out all moneys appropriated by Congress for the Government Hospital for the Insane, or otherwise received for the purposes of the hospital, and all moneys received by the superintendent in behalf of the hospital or its patients, and keep an accurate account or accounts thereof. The said disbursing agent shall deposit in the Treasury of the United States, under the direction of the superintendent, all funds now in the hands of the superintendent or which may hereafter be intrusted to him by or for the use of patients, which shall be kept in a separate account; and the said disbursing agent is authorized to draw therefrom, under the direction of the said superintendent, from time to time, under such regulations as the Secretary of the Interior may prescribe, for the use of such patients, but not to exceed for any one patient the amount intrusted to the superintendent on account of such patient. * * * *R. S. 4839, as amended by sec. 1, act of Feb. 2, 1909 (35 Stat. 592).*

The superintendent was required to give a special bond for the faithful performance of his duties as custodian of the funds of patients intrusted to him, by a provision of act of July 1, 1898 (30 Stat. 623).

Notes of Decisions.

Disbursements and pensions.—The statute refers only to disbursements for the support of administrative expenses of the hos-	pital, and not to disbursements for new buildings. <i>Evans v. U. S.</i> (1903), 44 Ct. Cl. 549.
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2048. Pensions of patients in Saint Elizabeths Hospital.— * * * During the time that any pensioner shall be an inmate of the Government Hospital for the Insane, all money due or becoming due upon his or her pension shall be paid by the pension agent to the superintendent or disbursing agent of the hospital, upon a certificate by such superintendent that the pensioner is an inmate of the hospital and is living, and such pension money shall be by said superintendent or disbursing agent disbursed and used, under regulations to be prescribed by the Secretary of the Interior, for the benefit of the pensioner, and, in case of a male pensioner, his wife, minor children, and dependent parents, or, if a female pensioner, her minor children, if any, in the order named, and to pay his or her board and maintenance in the hospital, the re-

remainder of such pension money, if any, to be placed to the credit of the pensioner and to be paid to the pensioner or the guardian of the pensioner in the event of his or her discharge from the hospital; or, in the event of the death of said pensioner while an inmate of said hospital, shall, if a female pensioner, be paid to her minor children, and, in the case of a male pensioner, be paid to his wife, if living; if no wife survives him, then to his minor children; and in case there is no wife nor minor children, then the said unexpended balance to his or her credit shall be applied to the general uses of said hospital: *Provided*, That in the case of any pensioner transferred to the hospital from the National Home for Disabled Volunteer Soldiers any pension money to his credit at said Home at the time of his said transfer shall be transferred with him to said hospital and placed to his credit therein, to be expended as hereinbefore provided, and in case of his return from said hospital to the Home any balance to his credit at said hospital shall in like manner be transferred to said Home, to be expended in accordance with the rules established in regard thereto, and this provision shall also be applicable to all unexpended pension money heretofore paid to the officers of said hospital on account of pensioners who were but are not now inmates thereof. *R. S. 4839, as amended by sec. 1, act of Feb. 2, 1909 (35 Stat. 592).*

The provisions added to R. S. 4839 by this amendment relating to pensions of inmates of the hospital reenacted in substance, and superseded provisions relating to such pensions made by amendment of a proviso of act of Aug. 7, 1882 (22 Stat. 330), by act of Feb. 20, 1905 (33 Stat. 781), entitled "An act relating to the payment and disposition of pension money due to inmates of the Government Hospital for the Insane."

Notes of Decisions.

Application of pension.—Where an inmate of the National Soldiers' Home becomes insane and is transferred to the Government Hospital for the Insane, the pension received by such inmate is to be devoted to his maintenance and treatment at

the hospital, and the excess cost of such maintenance and treatment over the amount of his pension is to be paid from funds appropriated for such hospital. (1908) 28 Op. Atty. Gen. 512.

2049. Disposal of articles made by patients in Saint Elizabeths Hospital.—The Secretary of the Interior is authorized to make regulations governing the disposal of articles produced by patients of Saint Elizabeths Hospital in the course of their curative treatment, either by allowing the patient to retain same or by selling the articles and depositing the money received to the credit of the appropriation from which the materials for making the articles were purchased. *Act of March 6, 1920 (41 Stat. 513), making appropriations to supply the deficiencies: Saint Elizabeths Hospital.*

2050. Insane persons admissible to Saint Elizabeths Hospital.—The superintendent, upon the order of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Treasury, respectively, shall receive, and keep in custody until they are cured, or removed by the same authority which ordered their reception, insane persons of the following descriptions:

First. Insane persons belonging to the Army, Navy, Marine Corps, and revenue-cutter service.

Second. Civilians employed in the Quartermaster's and Subsistence Departments of the Army who may be, or may hereafter become, insane while in such employment.

Third. Men who, while in the service of the United States, in the Army, Navy, or Marine Corps, have been admitted to the hospital, and have been

thereafter discharged from it on the supposition that they have recovered their reason, and have, within three years after such discharge, become again insane from causes existing at the time of such discharge, and have no adequate means of support.

Fourth. Indigent insane persons who have been in either of the said services and been discharged therefrom on account of disability arising from such insanity.

Fifth. Indigent insane persons who have become insane within three years after their discharge from such service, from causes which arose during and were produced by said service. *R. S. 4843.*

This section was amended by act of Feb. 9, 1909 (31 Stat. 7), by inserting, in subdivision second thereof, after the words "civilians employed in the Quartermaster's," the word "Pay," which amendment is omitted here as the Pay Department no longer exists.

Insane patients of the Marine Hospital Service, now the Public Health Service, were to be admitted to the hospital by sec. 5, act of Mar. 3, 1875 (18 Stat. 486).

The indigent insane of the District of Columbia were to be entitled to the benefit of the hospital by *R. S. 4844.*

Notes of Decisions.

Persons entitled to admission.—The Government Hospital for the Insane in the District of Columbia is designed only for the use of the Army and Navy, and for such other persons as may be residents of the District at the time of becoming insane. (1855) 7 Op. Atty. Gen. 450.

An enlisted man who had been discharged from the Army because of insanity was properly admitted to Saint Elizabeths Hospital, upon the order of the Secretary of the Treasury, as an insane patient of the Bureau of War Risk Insurance. (1919) 81 Op. Atty. Gen. 481.

Volunteer soldiers who become insane within a period of more than three years

after their discharge from service might, under the prior act of July 13, 1866, be admitted to the Government Hospital for the Insane in the District of Columbia, whether at the time they became insane they were inmates of any volunteer soldiers' asylum or not. (1873) 14 Op. Atty. Gen. 225.

A contract surgeon, while serving as such in the Army, is a person belonging to the Army, within the meaning of this section, and if he becomes insane in such service is entitled under that section to admission to the Government Hospital for the Insane. (1906) 26 Op. Atty. Gen. 74.

2051. Insane members of the Soldiers' Home admitted to Saint Elizabeths Hospital.—And in addition to the persons now entitled to admission to the Government Hospital for the Insane, any inmate of the Soldiers' Home who is now or may hereafter become insane shall, upon an order of the president of the Board of Commissioners of the Soldiers' Home, be admitted to said hospital and treated therein; and the expenses of maintaining any such person shall be paid from the Soldiers' Home fund. *Act of July 7, 1884 (23 Stat. 213).*

See notes to, ante, 2048 and 2050.

2052. Admission of insane inmates of National Home for Disabled Volunteers to Saint Elizabeths Hospital.—*Provided,* That in addition to the persons now entitled to admission to said hospital, any inmate of the National Home for Disabled Volunteer Soldiers who is now or may hereafter become insane shall, upon an order of the president of the Board of Managers of the said National Home, be admitted to said hospital and treated therein. * * * *Act of Feb. 20, 1905 (33 Stat. 781), amending act of Aug. 7, 1882 (22 Stat. 330).*

This was the first part of a proviso annexed to a provision for the sale, etc., of surplus products, etc., of the hospital, in the sundry civil appropriation act for the fiscal year 1883. For portion omitted see note to 2048, ante.

2053. Transfer of insane convicts to Saint Elizabeths Hospital.—That upon the application of the Attorney-General the Secretary of the Interior be, and he is hereby, authorized and directed to transfer to the Government Hospital for the

Insane in the District of Columbia all persons who, having been charged with offenses against the United States, are in the actual custody of its officers, and all persons who have been or shall be convicted of any offense in a court of the United States and are imprisoned in any State prison or penitentiary of any State or Territory, and who during the term of their imprisonment have or shall become and be insane. *Sec. 1, act of June 23, 1874 (18 Stat. 251), as amended by act of Aug. 7, 1882 (22 Stat. 330).*

Recent Army appropriation acts, in making the appropriation for the transportation of the Army, and its supplies, have provided for transportation on release from confinement. See 538, ante.

Notes of Decisions.

<p>Transfer of insane convicts to hospital.— Insane convicts in the penitentiary of the District of Columbia may be transferred to</p>	<p>the insane asylum on order of the Secretary of the Interior. (1857) 5 Op. Atty. Gen. 390.</p>
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2054. Return of convicts from Saint Elizabeths Hospital to prison.—That whenever such insane convict shall be restored to sanity, after he or she shall have been transferred under the provisions of this act, he or she shall be returned to the prison or penitentiary from which the transfer was made, provided the term of imprisonment shall not have expired. The questions of sanity in all cases arising under this act shall be determined in accordance with the rules and regulations of existing laws, State or national, on that subject, applicable to the prison, penitentiary, or asylum where such convict shall be confined. *Sec. 3, act of June 23, 1874 (18 Stat. 252).*

2055. Transfer of patients from Saint Elizabeths Hospital to other hospitals.—The Secretary of War is authorized, during the existing emergency, to transfer to the various public hospitals for the care of the insane, patients of every class entitled to treatment in Saint Elizabeths Hospital and that are admitted on order of the Secretary of War.

* * * The superintendent of such public hospital shall possess the right to retain the aforementioned class of patients in his hospital in the same manner and to the same extent as now possessed by the Superintendent of Saint Elizabeths Hospital.

The Superintendent of Saint Elizabeths Hospital, with the approval of the Secretary of the Interior, shall transfer to the various public hospitals out of the various appropriations made by Congress for the support and treatment of patients in Saint Elizabeths Hospital a sum sufficient to pay for the support and treatment of patients sent to public hospitals as herein provided, based upon the per capita cost of maintenance in Saint Elizabeths Hospital, said payment not to exceed at any time the exact cost of support and treatment of such patients. *Act of Oct. 6, 1917 (40 Stat. 373), making appropriations to supply deficiencies.*

2056. Insane of the Army, etc., committed to public hospitals in California.—The Secretary of War may, in his discretion, contract for the care, maintenance, and treatment of the insane of the Army, and inmates of the National Home for Disabled Volunteer Soldiers on the Pacific coast at any State asylum in California, in all cases which he is now authorized by law to cause to be sent to the Government Hospital for the Insane in the District of Columbia. *Act of Mar. 3, 1901 (31 Stat. 1163).*

The establishment of a branch home on the Pacific coast was authorized by act Mar. 2, 1887 (24 Stat. 444).

See notes to R. S. 4843, ante, 2050.

2057. Care of the insane in the Philippine Islands.— * * * *Provided*, That hereafter the Secretary of War may, in his discretion, contract for the care, maintenance, and treatment of the insane natives of the Philippine Islands serving in the Army of the United States at any asylum in the Philippine Islands in all cases which he is now authorized by law to cause to be sent to the Government Hospital for the Insane in the District of Columbia. *Act of May 11, 1908 (35 Stat. 122).*

For care, maintenance, and treatment at asylums in the Philippine Islands of insane natives of the Philippine Islands cared for in such institutions conformable to the Act of Congress approved May 11, 1908, \$2,000. *Act of June 5, 1920 (41 Stat. 968), making appropriations for the support of the Army: Bureau of Insular Affairs.*

2058. Care of the insane in Porto Rico.—For care, maintenance, and treatment at asylums in Porto Rico of insane soldiers of the Porto Rico Regiment of Infantry, \$100. *Act of June 5, 1920 (41 Stat. 968), making appropriations for the support of the Army: Bureau of Insular Affairs.*

2059. Insane prisoners of war and interned aliens.—Interned persons and prisoners of war, under the jurisdiction of the War Department, who are or may become insane hereafter shall be entitled to admission for treatment to Saint Elizabeths Hospital. *Act of Oct. 6, 1917 (40 Stat. 373), making appropriations to supply deficiencies.*

2060. Transfer of insane from military hospitals to nearest public hospitals.—The Secretary of War is authorized to transfer from any military hospital to the nearest available public hospital for the care of the insane any insane patient who is in need of treatment, preference being given to the hospital nearest to the place of the patient's enlistment. * * * *Act of Oct. 6, 1917 (40 Stat. 373).*

2061. Interdepartmental Social Hygiene Board.—That there is hereby created a board to be known as the Interdepartmental Social Hygiene Board, to consist of the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury as ex officio members, and of the Surgeon General of the Army, the Surgeon General of the Navy, and the Surgeon General of the Public Health Service, or of representatives designated by the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury, respectively. The duties of the board shall be: (1) To recommend rules and regulations for the expenditure of moneys allotted to the States under section five of this chapter; (2) to select the institutions and organizations and fix the allotments to each institution under said section five; (3) to recommend to the Secretary of the Treasury, the Secretary of War, and the Secretary of the Navy such general measures as will promote correlation and efficiency in carrying out the purposes of this chapter by their respective departments; and (4) to direct the expenditure of the sum of \$100,000 referred to in the last paragraph of section seven of this chapter. The board shall meet at least quarterly, and shall elect annually one of its members as chairman, and shall adopt rules and regulations for the conduct of its business. *Sec. 1, chap. XV, act of July 9, 1918 (40 Stat. 886).*

2062. States assisted in care of venereal patients.—That the Secretary of War and the Secretary of the Navy are hereby authorized and directed to adopt measures for the purpose of assisting the various States in caring for civilian persons whose detention, isolation, quarantine, or commitment to institutions may be found necessary for the protection of the military and naval forces of the United States against venereal diseases. *Sec. 2, chap. XV, act of July 9, 1918 (40 Stat. 886).*

That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$1,000,000, to be expended under the joint direction of the Secretary of War and the Secretary of the Navy to carry out the provisions of section two of this chapter: *Provided*, That the appropriation herein made shall not be deemed exclusive, but shall be in addition to other appropriations of a more general character which are applicable to the same or similar purposes. *Sec. 5, chap. XV, act of July 9, 1918 (40 Stat. 887).*

That the terms "State" and "States," as used in this chapter, shall be held to include the District of Columbia. *Sec. 8, chap. XV, act of July 9, 1918 (40 Stat. 887).*

For assisting the States in protecting the military and naval forces of the United States against venereal diseases, \$150,000; and the unexpended balance on June 30, 1920 (approximately \$250,000), of the appropriation heretofore made for this purpose is continued and made available during the fiscal year 1921: *Provided*, That no part of these sums shall be expended in assisting reformatories, detention homes, hospitals, or other similar institutions in the maintenance of venereally infected persons; * * * *Act of June 5, 1920 (41 Stat. 888), making appropriations for sundry civil expenses: Interdepartmental Social Hygiene Board.*

2063. Research for the Interdepartmental Social Hygiene Board.—That there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated * * * annually for two fiscal years, beginning with the fiscal year commencing July first, nineteen hundred and eighteen, * * * the sum of \$100,000, which shall be paid to such universities, colleges, or other suitable institutions, as in the judgment of the Interdepartmental Social Hygiene Board are qualified for scientific research, for the purpose of discovering, in accordance with rules and regulations prescribed by the Interdepartmental Social Hygiene Board, more effective medical measures in the prevention and treatment of venereal diseases; the sum of \$300,000, which shall be paid to such universities, colleges, or other suitable institutions or organizations, as in the judgment of the Interdepartmental Social Hygiene Board are qualified for scientific research, for the purpose of discovering and developing more effective educational measures in the prevention of venereal diseases, and for the purpose of sociological and psychological research related thereto. *Sec. 6, chap. XV, act of July 9, 1918 (40 Stat. 887).*

That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, * * * the sum of \$100,000 to be used under the direction of the Interdepartmental Social Hygiene Board for any purpose for which any of the appropriations made by this chapter are available. *Sec. 7, chap. XV, act of July 9, 1918 (40 Stat. 887).*

For payment to universities, colleges, and other suitable institutions, for scientific research for the purpose of discovering more effective medical measures in the prevention and treatment of venereal diseases, \$85,000;

For payment to universities, colleges, and other suitable institutions and organizations for the purpose of discovering and developing more effective educational measures in the prevention of venereal diseases, \$250,000;

No part of the respective sums contained in the two preceding paragraphs shall be paid to any university, college, institution, or organization which does not set aside an additional sum for the same purpose at least equal to the amount to be received from the United States; * * * *Act of June 5, 1920 (41 Stat. 888), making appropriations for sundry civil expenses: Interdepartmental Social Hygiene Board.*

CHAPTER 32.

CIVIL RELIEF OF SOLDIERS.

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2064. Protection of debtors.—No enlisted man shall, during his term of service, be arrested on mesne process, or taken or charged in execution for any debt, unless it was contracted before his enlistment, and amounted to twenty dollars when first contracted. *R. S. 1237.*

2065. Suspension of legal proceedings.—That for the purpose of enabling the United States the more successfully to prosecute and carry on the war in which it is at present engaged, protection is hereby extended to persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service

during the continuance of the present war. *Sec. 100, act of March 8, 1918 (40 Stat. 440).*

Sec. 604, act of Mar. 8, 1918 (40 Stat. 449), provides "That this Act may be cited as the Soldiers' and Sailors' Civil Relief Act."

2086. Period during which Soldiers' and Sailors' Civil Relief Act will be in force.—That this Act shall remain in force until the termination of the war, and for six months thereafter: *Provided*, That wherever under any section or provision of this Act a proceeding, remedy, privilege, stay, limitation, accounting, or other transaction has been authorized or provided, the due exercise or enjoyment of which may extend beyond the period herein fixed for the termination of this Act, such section or provision shall be deemed to continue in full force and effect so long as may be necessary to the exercise or enjoyment of the proceeding, remedy, privilege, stay, limitation, accounting, or transaction aforesaid. *Sec. 603, act of March 8, 1918 (40 Stat. 449).*

For joint resolution providing that certain statutes the operation of which is contingent upon the existence of a state of war shall be construed as if the World War had ended on March 3, 1921, see 2835, post.

Notes of Decisions.

Foreclosure of mortgage.—Where a bond was signed by a chief yeoman in the Naval Reserve, and was secured by a mortgage on the real estate of another person, the mortgage may be foreclosed in regular course, in the absence of proof that injury would result to the sailor by reason of his being in the service, and that he is thereby

unable to protect his interest. A stay in entering personal judgment against the sailor for any deficiency over the amount realized from the real estate was properly granted by the trial court until six months after the termination of the war with Germany. *Dietz v. Treupel (1918) 170 N. Y. Supp. 108.*

2087. Relief of sureties, etc., of soldiers.—Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, indorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended.

When a judgment or decree is vacated or set aside in whole or in part, as provided in this Act, the same may, in the discretion of the court, likewise be set aside and vacated as to any surety, guarantor, indorser, or other person liable upon the contract or liability for the enforcement of which the judgment or decree was entered. *Sec. 103, act of Mar. 8, 1918 (40 Stat. 441).*

2088. Definition of terms used in the Soldiers' and Sailors' Civil Relief Act.—(1) That the term "persons in military service," as used in this Act, shall include the following persons and no others: All officers and enlisted men of the Regular Army, the Regular Army Reserve, the Officers' Reserve Corps, and the Enlisted Reserve Corps; all officers and enlisted men of the National Guard and National Guard Reserve recognized by the Militia Bureau of the War Department; all forces raised under the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen; all officers and enlisted men of the Navy, the Marine Corps, and the Coast Guard; all officers and enlisted men of the Naval Militia, Naval Reserve force, Marine Corps

Reserve, and National Naval Volunteers recognized by the Navy Department; all officers of the Public Health Service detailed by the Secretary of the Treasury for duty either with the Army or the Navy; any of the personnel of the Light-house Service and of the Coast and Geodetic Survey transferred by the President to the service and jurisdiction of the War Department or of the Navy Department; members of the Nurse Corps; Army field clerks; field clerks, Quartermaster Corps; civilian clerks and employees on duty with the military forces detailed for service abroad in accordance with provisions of existing law; and members of any other body who have heretofore or may hereafter become a part of the military or naval forces of the United States. The term "military service," as used in this definition, shall signify active service in any branch of service heretofore mentioned or referred to, but reserves and persons on the retired list shall not be included in the term "persons in military service" until ordered to active service. The term "active service" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(2) The term "period of military service," as used in this Act, shall include the time between the following dates: For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

(3) The term "person," as used in this Act, with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association.

(4) The term "court" as used in this Act shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record.

(5) The term "termination of the war" as used in this Act shall mean the termination of the present war by the treaty of peace as proclaimed by the President. *Sec. 101, act of Mar. 8, 1918 (40 Stat. 440).*

For joint resolution providing that certain statutes the operation of which is contingent upon a state of war shall be construed as if the World War had ended on March 3, 1921, see 2835, post.

2069. Enforcement of the Soldiers' and Sailors' Civil Relief Act.—(1) That the provisions of this Act shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, and to proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed.

(2) When under this Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court. *Sec. 102, act March 8, 1918 (40 Stat. 441).*

2070. Attorneys to represent persons in military service.—In any action or proceeding in which a person in military service is a party if such party does not personally appear therein, or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service

shall have power to waive any right of the person for whom he is appointed or bind him by his acts. *Sec. 200(3), act of March 8, 1918 (40 Stat. 442).*

A "like bond" refers to a bond such as described in 2073, post.

2071. Penalty for false affidavit.—Any person who shall make or use affidavit required under this section knowing it to be false shall be guilty of a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both. *Sec. 200(2), act of March 8, 1918 (40 Stat. 441).*

2072. Affidavit as to military service filed after entry of judgment.—That where any judgment has been entered since March 8, 1918, in any action or proceeding commenced in any court where there was a failure to file in such action the affidavits required by section 200 of article 2 of the Act approved March 8, 1918, entitled "An Act to extend protection to the civil rights of members of the Military and Naval Establishments of the United States engaged in the present war" (Fortieth Statutes at Large, page 440), the plaintiff, after such notice as the court may prescribe, may file an affidavit stating that the defendant, or defendants, in default in such judgments, are not at the time of such filing, and were not at the time of the entry of such judgment, in the naval or military service of the United States, and upon the filing of such affidavit the court may enter an order that such judgment, if otherwise legal, shall stand and be effective as of the date of the entry of such judgment as if such affidavit had been duly filed. Any person who shall make or use such an affidavit as aforesaid, knowing it to be false, shall be punishable by imprisonment not to exceed two years or by fine not to exceed \$5,000, or both, in the discretion of the court. *Act of Sept. 3, 1919 (41 Stat. 282).*

2073. Protection against judgment on default.—That in any action or proceeding commenced in any court if there shall be a default of an appearance by the defendant the plaintiff before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require as a condition before judgment is entered that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act. *Sec. 200 (1), act of March 8, 1918 (40 Stat. 441).*

Notes of Decisions.

Benefit of section.—Failure to file the affidavit required by this section does not entitle defendants who were not, in fact, in the military service, to have set aside a

default judgment against them. *Howie Mining Co. v. McGary (D. C. 1919), 256 Fed. 38.*

2074. Judgment reopened after discharge from military service.—If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment. *Sec. 200 (4), act of March 8, 1918 (40 Stat. 442).*

2075. Stay of proceedings.—That at any stage thereof any action or proceeding commenced in any court by or against a person in military service during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service. *Sec. 201, act of March 8, 1918 (40 Stat. 442).*

Notes of Decisions.

Furlough.—A member of the National Guard who was in the Federal service was granted a furlough to return to attend to some of his private business. While on his way to the train to return to his regiment within the time specified by his furlough he was served with summons and complaint. He had only half an hour in which

to employ an attorney and advise him of the situation. The guardsman's testimony was necessary to explain books of account required for his defense. Held, That the trial court abused its discretion in refusing to grant a continuance of the case. *Elliott v. Lawson (1918), 170 Pac. 925, Supreme Court of Oregon.*

2076. Stay of action for breach of contract.—That when an action for compliance with the terms of any contract is stayed pursuant to this Act no fine or penalty shall accrue by reason of failure to comply with the terms of such contract during the period of such stay, and in any case where a person fails to perform any obligation and a fine or penalty for such nonperformance is incurred a court may, on such terms as may be just, relieve against the enforcement of such fine or penalty if it shall appear that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred and that by reason of such service the ability of such person to pay or perform was thereby materially impaired. *Sec. 202, act of March 8, 1918 (40 Stat. 442).*

2077. Stay of execution, and vacation or stay of attachment or garnishment.—That in any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service:

(1) Stay the execution of any judgment or order entered against such person, as provided in this Act, and

(2) Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment, as provided in this Act. *Sec. 203, act of March 8, 1918 (40 Stat. 442).*

2078. Continuance of stay of proceedings.—That any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, and subject to such terms as may be just, whether as to payment in installments of such amounts and at such times as the court may fix or otherwise. * * * *Sec. 204, act of March 8, 1918 (40 Stat. 442).*

2079. Period of military service not included in time of statutes of limitations.—That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service. *Sec. 205, act of March 8, 1918 (40 Stat. 443).*

Notes of Decisions.

<p>Absence of attorney.—A failure to apply for a bankrupt's discharge within the statutory period of 18 months by reason of the bankrupt's attorney having entered the</p>	<p>military service does not give the court jurisdiction to entertain a motion for the bankrupt's discharge under this section. <i>In re Weldon (D. C. 1920), 262 Fed. 822.</i></p>
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2080. Proceedings against codefendants.— * * * Where the person in military service is a codefendant with others the plaintiff may nevertheless by leave of court proceed against the others. *Sec. 204, act of March 8, 1918 (40 Stat. 442).*

2081. Evidence of military service.—That in any proceeding under this Act a certificate signed by The Adjutant General of the Army as to persons in the Army or in any branch of the United States service while serving pursuant to law with the Army, signed by the Chief of the Bureau of Navigation of the Navy Department as to persons in the Navy or in any other branch of the United States service while serving pursuant to law with the Navy, and signed by the Major General, Commandant, United States Marine Corps, as to persons in the Marine Corps, or in any other branch of the United States service while serving pursuant to law with the Marine Corps, or signed by an officer designated by any of them, respectively, for the purpose, shall when produced be prima facie evidence as to any of the following facts stated in such certificate:

That a person named has not been, or is, or has been in military service; the time when and the place where such person entered military service, his residence at that time, and the rank, branch, and unit of such service that he entered, the dates within which he was in military service, the monthly pay received by such person at the date of issuing the certificate, the time when and place where such person died in or was discharged from such service.

It shall be the duty of the foregoing officers to furnish such certificate on application, and any such certificate when purporting to be signed by any one of such officers or by any person purporting upon the face of the certificate to have been so authorized shall be prima facie evidence of its contents and of the authority of the signer to issue the same. *Sec. 601 (1), act of March 8, 1918 (40 Stat. 448).*

2082. Proof of death in military service.—Where a person in military service has been reported missing he shall be presumed to continue in the service until

accounted for, and no period herein limited which begins or ends with the death of such person shall begin or end until the death of such person is in fact reported to or found by the Department of War or Navy, or any court or board thereof, or until such death is found by a court of competent jurisdiction: *Provided*, That no period herein limited which begins or ends with the death of such person shall be extended hereby beyond a period of six months after the termination of the war. *Sec. 601 (2), act of March 8, 1918 (40 Stat. 449).*

2083. Interlocutory orders.—That any interlocutory order made by any court under the provisions of this Act may, upon the court's own motion or otherwise, be revoked, modified, or extended by it upon such notice to the parties affected as it may require. *Sec. 602, act of March 8, 1918 (40 Stat. 449).*

2084. Transfer of interest.—That where in any proceeding to enforce a civil right in any court it is made to appear to the satisfaction of the court that any interest, property, or contract has since the date of the approval of this Act been transferred or acquired with intent to delay the just enforcement of such right by taking advantage of this Act, the court shall enter such judgment or make such order as might lawfully be entered or made the provisions of this Act to the contrary notwithstanding. *Sec. 600, act of March 8, 1918 (40 Stat. 448).*

2085. Taxes on real property unpaid.—That the provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid. *Sec. 500 (1), act of March 8, 1918 (40 Stat. 447).*

2086. Collection of taxes stayed.—When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the war. *Sec. 500 (2), act of March 8, 1918 (40 Stat. 447).*

2087. Redemption of property sold for taxes.—When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the termination of the war; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption. *Sec. 500 (3), act of March 8, 1918 (40 Stat. 447).*

2088. Interest on unpaid taxes.—Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until

paid at the rate of six per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon. *Sec. 500 (4), act of March 8, 1918 (40 Stat. 447).*

2089. Rent not paid by dependents of soldiers.—(1) That no eviction or distress shall be made during the period of military service in respect of any premises for which the agreed rent does not exceed \$50 per month, occupied chiefly for dwelling purposes by the wife, children, or other dependents of a person in military service, except upon leave of court granted upon application therefor or granted in an action or proceeding affecting the right of possession.

(2) On any such application or in any such action the court may, in its discretion, on its own motion, and shall, on application, unless in the opinion of the court the ability of the tenant to pay the agreed rent is not materially affected by reason of such military service, stay the proceedings for not longer than three months, as provided in this Act, or it may make such other order as may be just. *Sec. 500, act of March 8, 1918 (40 Stat. 448).*

2090. Punishment for unlawful eviction.—Any person who shall knowingly take part in any eviction or distress otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor, and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both. *Sec. 500 (3), act of March 8, 1918 (40 Stat. 448).*

2091. Compulsory allotment of pay to discharge rent.—The Secretary of War or the Secretary of the Navy, as the case may be, is hereby empowered, subject to such regulations as he may prescribe, to order an allotment of the pay of a person in military service in reasonable proportion to discharge the rent of premises occupied for dwelling purposes by the wife, children, or other dependents of such person. *Sec. 500 (4), act of March 8, 1918 (40 Stat. 448).*

2092. Installments due on purchase of real property not paid.—(1) That no person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment falling due during the period of such military service, except by action in a court of competent jurisdiction.

(1a) Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

(2) Upon the hearing of such action the court may order the repayment of prior installments or deposits or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interests of all parties. *Sec. 501, act of March 8, 1918 (40 Stat. 448).*

2093. Mortgage obligations.—(1) The provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service, the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—

(a) Stay the proceedings as provided in this Act; or

(b) Make such other disposition of the case as may be equitable to conserve the interests of all parties. *Sec. 302, act of March 8, 1918 (40 Stat. 444).*

2094. Sale of mortgaged property restricted.—No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court. *Sec. 302 (3), act of March 8, 1918 (40 Stat. 444).*

2095. Definition of policy, premium, insured, insurer.—That in this Article the term "policy" shall include any contract of life insurance on the level premium or legal reserve plan. It shall also include any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association; the term "premium" shall include membership dues or assessments in such association, and the date of issuance of policy as herein limited shall refer to the date of admission to membership in such association; the term "insured" shall include any person who is the holder of a policy as defined in this Article; the term "insurer" shall include any corporation, partnership, or other form of association which secures or provides insurance under any policy as defined in this Article. *Sec. 400, act of March 8, 1918 (40 Stat. 444).*

2096. Life insurance policies protected during military service.—That no policy which has not lapsed for the nonpayment of premium before the commencement of the period of military service of the insured, and which has been brought within the benefits of this Article, shall lapse or be forfeited for the nonpayment of premium during the period of such service or during one year after the expiration of such period: *Provided*, That in no case shall this prohibition extend for more than one year after the termination of the war. *Sec. 405, act of March 8, 1918 (40 Stat. 445).*

2097. Application for protection of life insurance.—That the benefits of this Article shall apply to any person in military service who is the holder of a policy of life insurance, when such holder shall apply for such benefits on a form prepared in accordance with regulations which shall be prescribed by the Secretary of the Treasury. Such form shall set forth particularly that the application therein made is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this Article and by receiving and filing the same the insurer shall be deemed

to have assented thereto, to the extent, if any, to which the policy on which the application is made is within the provisions of this Article. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Bureau of War Risk Insurance.

The Bureau of War Risk Insurance shall issue through suitable military and naval channels a notice explaining the provisions of this Article and shall furnish forms to be distributed to those desiring to make application for its benefits. *Sec. 401, act of March 8, 1918 (40 Stat. 444).*

2098. Maximum of life insurance to be protected.—That the benefits of this Act shall be available to any person in military service in respect of contracts of insurance in force under their terms up to but not exceeding a face value of \$5,000, irrespective of the number of policies held by such person whether in one or more companies, when such contracts were made and a premium was paid thereon before September first, nineteen hundred and seventeen; * * * *Sec. 402, act of March 8, 1918 (40 Stat. 444).*

2099. Restriction on protection of insurance in case of unpaid premiums and loans.—* * * but in no event shall the provisions of this Article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this Article is made or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than fifty per centum of the cash surrender value of the policy. *Sec. 402, act of March 8, 1918 (40 Stat. 445).*

2100. Rejection of excess insurance.—That when one or more applications are made under this Article by any one person in military service in respect of insurance exceeding a total face value of \$5,000, whether on one or more policies or in one or more companies, and the insured shall not in his application indicate an order of preference, the Bureau of War Risk Insurance shall reject such policies as have the inferior cash surrender value, so as to reduce the total benefits conferred within the face value of \$5,000, and where necessary for this purpose shall direct the insurer to divide any policy into two separate policies. The said bureau shall immediately notify the insurer and the insured in writing of the policy. *Sec. 404, act of March 8, 1918 (40 Stat. 445).*

2101. Life insurance policies voidable for military service.—That this Article shall not apply to any policy which is void or which may at the option of the insurer be voidable, if the insured is in military service, either in this country or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount as premium. *Sec. 414, act of March 8, 1918 (40 Stat. 447).*

2102. Record of policy-holders.—That the Bureau of War Risk Insurance shall, subject to regulations, which shall be prescribed by the Secretary of the Treasury, compile and maintain a list of such persons in military service as have made application for the benefits of this Article, and shall (1) reject any applications for such benefits made by persons who are not persons in military service; (2) reject any applications for such benefits in excess of the amount permitted by section four hundred and two; and (3) reject any applications in respect of contracts of insurance otherwise not entitled to the benefits of this Article. Said bureau shall immediately notify the insurer and the insured in writing of every rejection or approval. *Sec. 403, act of March 8, 1918 (40 Stat. 445).*

2103. Monthly reports from insurers.—That within the first fifteen days of each calendar month after the date of approval of this Act until the expiration of one year after the termination of the war, every insurance corporation or association to which application has been made as herein provided, for the benefits of this Article, shall render to the Bureau of War Risk Insurance a report, duly verified, setting forth the following facts:

First. The names of the persons who have applied for such benefits, and the face value of the policies in respect of which such benefits have been applied for by such persons, during the preceding calendar month;

Second. A list as far as practicable of the premiums in respect of policies entitled to the benefits of this Article which remain unpaid on the last day of the preceding calendar month, which day is at least thirty-one days after the due date of the premiums, provided such premiums have not previously been so reported as in default;

Third. A list of premiums which, having been previously reported as in default, have been paid by the policyholder or some one on his behalf in whole or in part during the preceding calendar month;

Fourth. A computation of the difference between the total amount of defaulted premiums therein reported and the total amount of premiums paid as therein reported, after having been previously reported as in default. From this sum shall be deducted the total sum of any premiums previously reported as in default, upon policies in respect of which the Bureau of War Risk Insurance has, since the date of such report, rejected an application for the benefits of this Article. The final sum so arrived at shall be denominated the monthly difference. *Sec. 406, act of March 8, 1918 (40 Stat. 445).*

2104. Verification of reports of insurers.—That the Bureau of War Risk Insurance shall verify the computation of monthly difference reported by each insurer, and shall certify it, as corrected, to the Secretary of the Treasury and the insurer. *Sec. 407, act of March 8, 1918 (40 Stat. 446).*

2105. Insurers to maintain reserves, etc.—That this Article shall apply only to insurance companies or associations which are required by the law under which they are organized or doing business to maintain a reserve, or, which if not so required, have made or shall make provision for the collection from all those insured in such insurer of a premium to cover the special war risk of those insured persons who are in military service. *Sec. 415, act of March 8, 1918 (40 Stat. 447).*

2106. United States bonds issued as security for unpaid premiums.—That the Secretary of the Treasury shall, within ten days thereafter, deliver each month to the proper officer of each insurer, bonds of the United States to the amount of that multiple of \$100 nearest to the monthly difference certified in respect of each insurer. Such bonds shall be registered in the names of the respective insurers, who shall be entitled to receive the interest accruing thereon, and such bonds shall not be transferred, or again registered, except upon the approval of the Director of the Bureau of War Risk Insurance, and shall remain in the possession of the insurer until settlement is made in accordance with this Article: *Provided*, That whenever the fact of insolvency shall be ascertained by the Director of the Bureau of War Risk Insurance all obligation on the part of the United States, under this Article, for future premiums on policies of such insurer shall thereupon terminate. An insurer shall furnish semiannual statements to the Bureau of War Risk Insurance. *Sec. 408, act of March 8, 1918 (40 Stat. 446).*

That the bonds so delivered shall be held by the respective insurers as security for the payment of the defaulted premiums with interest. To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this Article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Bureau of War Risk Insurance must be obtained. *Sec. 409, act of March 8, 1918 (40 Stat. 446).*

2107. Final settlement between United States and insurers.—That at the expiration of one year after the termination of the war there shall be an account stated between each insurer and the United States, in which the following items shall be credited to the insurer:

- (1) The total amount of the monthly differences reported under this Article;
- (2) The difference between the total interest received by the insurer upon the bonds held by it as security and the total interest upon such monthly differences at the rate of five per centum per annum; and in which there shall be credited to the United States the amount of the cash surrender value of each policy lapsed or forfeited as provided in section four hundred and eleven, but not in any case a greater amount on any policy than the total of the unpaid premiums with interest thereon at the rate provided for in the policy for policy loans. *Sec. 412, act of March 8, 1919 (40 Stat. 446).*

That the balance in favor of the insurer shall, in each case, be paid to it by the United States upon the surrender by the insurer of the bonds delivered to it from time to time by the Secretary of the Treasury under the provisions of this Article. *Sec. 413, act of March 8, 1918 (40 Stat. 446).*

2108. Unpaid premiums deducted from proceeds of a policy in case of death.—That in the event that the military service of any person being the holder of a policy receiving the benefits of this Article shall be terminated by death, the amount of any unpaid premiums, with interest at the rate provided for in the policy for policy loans, shall be deducted from the proceeds of the policy and shall be included in the next monthly report of the insurer as premiums paid. *Sec. 410, act of March 8, 1918 (40 Stat. 446).*

2109. Insurance policy to lapse if premiums remain unpaid after discharge from military service.—That if the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof, if any: *Provided*, That if the insured is in the military service at the termination of the war such lapse shall occur and surrender value be payable at the expiration of one year after the termination of the war. *Sec. 411, act of March 8, 1918 (40 Stat. 446).*

2110. Exemption from income tax.—That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"— * * *

(b) Does not include the following items, which shall be exempt from taxation under this title: * * *

(8) So much of the amount received during the present war by a person in the military or naval forces of the United States as salary or compensation in

any form from the United States for active services in such forces, as does not exceed \$3,500. *Sec. 213 (b) (8), act of Feb. 24, 1919 (40 Stat. 1065, 1066).*

2111. Exemption from tax on amusements.—That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 700 of the Revenue Act of 1917—

(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission;

(2) In the case of persons (except bona fide employees, municipal officers on official business, persons in the military or naval forces of the United States when in uniform, and children under twelve years of age) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, a tax of 1 cent for each 10 cents or fraction thereof of the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted; * * * *Sec. 800 (a), act of Feb. 24, 1919 (40 Stat. 1120).*

2112. Tax on amusements if proceeds inure to the benefit of soldiers.—No tax shall be levied under this title in respect to any admissions all the proceeds of which inure exclusively to the benefit of * * * persons in the military or naval forces of the United States, * * * *Sec. 800 (b), act of Feb. 24, 1919 (40 Stat. 1121).*

CHAPTER 33.

ORGANIZATION OF THE ARMY.

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HISTORICAL NOTE.

Regular Army.—During Washington's two terms as President, the Regular Army varied in strength from 1,000 to 5,000 men. In 1798, in view of the prospect of a rupture with France, the enlistment of 10,000 men to serve for three years in a provisional army was authorized (1 Stat. 558), which was mustered out in 1800 as soon as the treaty with France was made. In 1811 the authorized force was 35,000. In 1820 a reduction to 6,000 men was voted. In 1838 the force was brought up to 12,500 on account of Indians on the frontier. For the Mexican War a regular force of 31,000 was authorized, but was not recruited to full strength. During the Civil War, Congress authorized between 39,000 and 54,000 regulars. After 1866 the Regular Army was limited to 25,000 enlisted men. The act of Apr. 22, 1898 (30 Stat. 361), which provided a force of 61,000 for the Spanish War, also specified a reduction after the conclusion of that war. The act of Feb. 2, 1901 (31 Stat. 748), provided for an organization under which the number might be varied at the discretion of the President from 59,000 to 100,000. Increase of strength in five annual increments was provided for by the national defense act of

June 3, 1916 (39 Stat. 166), which has been modified by the act of June 4, 1920 (41 Stat. 759).

Volunteer Army.—The first Volunteer Army was created during the War of 1812 by special statute, which left the States in control of the recruiting of regiments and appointment of officers. A similar force was authorized during the Mexican War and during the Civil War. The statutes under which these volunteer forces were authorized are so numerous, involving bounties and other inducements, that it is not considered practicable to set them out here. After declaration of war against Spain, under the act of Apr. 22, 1898 (30 Stat. 361), a call was addressed to the governors of the States for 125,000 volunteers, and subsequent acts authorized a volunteer brigade of Engineers and a force of 10,000 men immune to tropical diseases. This force was mustered out in 1899, except for a force to serve six months in the Philippine Islands; and a force of 35,000 to serve not later than July 1, 1901, was authorized by sec. 12, act of Mar. 2, 1899 (30 Stat. 980). The act of Apr. 23, 1914 (38 Stat. 347), provided "for raising the volunteer forces of the United States in time of actual or threatened war," the President to determine the number needed and to appoint the officers; sec. 2 of that act is as follows: "That the volunteer forces shall be raised, organized, and maintained, as in this Act provided, only during the existence of war, or while war is imminent, and only after Congress shall have authorized the President to raise such a force: *Provided*, That the term of enlistment in the volunteer forces shall be the same as that for the Regular Army, exclusive of reserve periods, and all officers and enlisted men composing such volunteer forces shall be mustered out of the service of the United States as soon as practicable after the President shall have issued a proclamation announcing the termination of the war or the passing of the imminence thereof." While par. 7, sec. 2, of the selective draft act of May 18, 1917 (40 Stat. 77), authorized the raising of four divisions of volunteers, no such forces were actually raised under that provision, and the Slavic Legion, authorized by the act of July 9, 1918 (40 Stat. 868), was the only volunteer force during the World War, all other additional forces being raised by draft. The Volunteer Army is not included in the military forces as defined by sec. 1, act of June 3, 1916 (39 Stat. 166), as amended by sec. 1, act of June 4, 1920 (41 Stat. 759); therefore legislation on this subject has been omitted from this book.

Army of the United States.—This term was used in the act of Feb. 2, 1901 (31 Stat. 748), with reference to the Regular Army only. In sec. 2, act of Apr. 22, 1898 (30 Stat. 361), providing "That the organized and active land forces of the United States shall consist of the Army of the United States and of the militia of the several States when called into the service of the United States: *Provided*, That in time of war the Army shall consist of two branches which shall be designated, respectively, as the Regular Army and the Volunteer Army of the United States." In sec. 1, act of Feb. 2, 1901 (31 Stat. 748), the term was stated to include the components comprised by the Regular Army. Sec. 1, act of Apr. 23, 1914 (38 Stat. 347), declared "That the land forces of the United States shall consist of the Regular Army, the organized land militia while in the service of the United States, and such volunteer forces as Congress may authorize." When the national defense act was originally enacted, June 2, 1916, sec. 1 (39 Stat. 166) thereof gave the following definition: "That the Army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now or may hereafter be authorized by law." For provisions of current law see 2113, post.

2113. Composition of the Army of the United States.—That the Army of the United States shall consist of the Regular Army, the National Guard while in the service of the United States, and the Organized Reserves, including the Officers' Reserve Corps and the Enlisted Reserve Corps. *Sec. 1, act of June 3, 1916 (39 Stat. 166), as amended by sec. 1, act of June 4, 1920 (41 Stat. 759).*

That all laws and parts of laws in so far as they are inconsistent with this Act are hereby repealed. *Sec. 52, chap. I, act of June 4, 1920 (41 Stat. 787).*

All laws and parts of laws in so far as they are inconsistent with this Act are hereby repealed. *Sec. 128, act of June 3, 1916 (39 Stat. 217).*

For definitions formerly in force see "Historical Note" at the head of this chapter.

The above statute makes no mention of a Volunteer Army; therefore legislation on that subject has been omitted from this book. See "Historical Note" at the beginning of this chapter.

Notes of Decisions.

Military forces.—The invariable policy of the Government has been to consider the military forces as falling into two classes: Those who were soldiers or sailors by profession, irrespective of the national exigency, who took war when it came, and, if they survived it, continued to make mili-

tary occupation the business of their lives; second, those who left their ordinary avocations at the outbreak of or during the continuance of hostilities and enlisted with the expectation of serving only so long as the exigency continued. *Clery v. U. S.* 35, Ct. Cls. 207, 211.

2114. Organization of the Army.—The Organized peace establishment, including the Regular Army, the National Guard and the Organized Reserves, shall include all of those divisions and other military organizations necessary to form the basis for a complete and immediate mobilization for the national defense in the event of a national emergency declared by Congress. The Army shall at all times be organized so far as practicable into brigades, divisions and army corps, and whenever the President may deem it expedient, into armies. For purposes of administration, training and tactical control, the continental area of the United States shall be divided on a basis of military population into corps areas. Each corps area shall contain at least one division of the National Guard or Organized Reserves, and such other troops as the President may direct. The President is authorized to group any or all corps areas into army areas or departments. *Sec. 3, act of June 3, 1916 (39 Stat. 166), as amended by sec. 3, act of June 4, 1920 (41 Stat. 759).*

In time of peace our Army has been habitually distributed into geographical commands, styled, respectively, military divisions, departments, and districts—the districts, as organized prior to 1815, corresponding to the commands now designated as corps areas or departments. These divisions and departments could be established only by the President; but, within their respective departments, commanding generals have from time to time grouped adjacent posts into temporary commands, known as districts, not referring thereby to the Coast Artillery districts found also in corps areas and departments.

Sec. 3, act of June 3, 1916, superseded R. S. 1114, which provided that in the ordinary arrangement of the Army two regiments of Infantry or of Cavalry should constitute a brigade, which should be the command of a brigadier general, and that two brigades should constitute a division, which should be the command of a major general, but that it should be in the discretion of the commanding general to vary such disposition whenever he might deem it proper to do so.

*Sec. 1 of the selective draft act of May 18, 1917 (40 Stat. 76), authorized the President "to increase or decrease the number of organizations prescribed for the typical brigades, divisions, or army corps of the Regular Army, and to prescribe such new and different organizations and personnel for army corps, divisions, brigades, regiments, battalions, squadrons, companies, troops, and batteries as the efficiency of the service may require: * * *"*

Notes of Decisions.

Construction of act.—The courts will not interfere with the discretion of the President and Secretary of War in the work of

reorganizing the Army, or in their construction of this act. *U. S. v. Root* (1903), 22 App. D. C. 419.

2115. Annual report of the strength of the Army.— * * * The Secretary of War shall annually report to Congress the numbers, grades, and assignments of the officers and enlisted men of the Army, and the number, kinds, and strength of organizations pertaining to each branch of the service. *Sec. 4c, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920 (41 Stat. 762).*

2116. Vacant.

2117. Definition of the Regular Army.—That the Regular Army is the permanent military establishment, which is maintained both in peace and war according to law. *Sec. 3, act of Apr. 22, 1898 (30 Stat. 361).*

2118. Composition of the Regular Army.—The Regular Army of the United States shall consist of the Infantry, the Cavalry, the Field Artillery, the Coast Artillery Corps, the Air Service, the Corps of Engineers, the Signal Corps, which shall be designated as the combatant arms or the line of the Army; the General Staff Corps; the Adjutant General's Department; the Inspector General's Department; the Judge Advocate General's Department; the Quartermaster Corps; the Finance Department; the Medical Department; the Ordnance Department; the Chemical Warfare Service; the officers of the Bureau of Insular Affairs; the officers and enlisted men under the jurisdiction of the Militia Bureau; the chaplains; the professors and cadets of the United States Military Academy; the present military storekeeper; detached officers; detached enlisted men; unassigned recruits; the Indian Scouts; the officers and enlisted men of the retired list; and such other officers and enlisted men as are now or may hereafter be provided for. * * * *Sec. 2, act of June 3, 1916 (39 Stat. 166), as amended by sec. 2, act of June 4, 1920 (41 Stat. 759).*

The section amended and sec. 1, act of Feb. 2, 1901 (31 Stat. 748), each prescribed the composition of the Army.

For the present and former authorized enlisted strength of the Army, see 2179, post.

2119. Proportionate strength of a branch.—Officers and enlisted men shall be assigned to the several branches of the Army as hereafter directed, a suitable proportion of each grade in each branch, but the President may increase or diminish the number of officers or enlisted men assigned to any branch by not more than a total of 15 per centum: *Provided*, That the total number authorized in any grade by this Act is not exceeded: *Provided further*, That the number of enlisted men herein authorized for any branch shall include such number of Philippine Scouts as may be organized in that branch: *Provided further*, That no officer shall be transferred from one branch of the service to another under the provisions of this section without his own consent. * * * *Sec. 4c, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920 (41 Stat. 762).*

A plan for increase of the Regular Army in five annual increments, each arm, corps, and department to receive annually one-fifth of the total increase authorized for it, etc., provided for by sec 24, act of June 3, 1916 (39 Stat. 182), was not completed by reason of the enactment of this superseding legislation.

2120. Increase of the Regular Army during the World War.—That in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized—

First. Immediately to raise, organize, officer, and equip all or such number of increments of the Regular Army provided by the national defense Act approved June third, nineteen hundred and sixteen, or such parts thereof as he may deem necessary; to raise all organizations of the Regular Army, including those added by such increments, to the maximum enlisted strength authorized by law. * * *

Third. * * * *Provided further*, That the number of organizations in a regiment shall not be increased nor shall the number of regiments be decreased: * * * *Sec. 1, act of May 18, 1917 (40 Stat. 76-77).*

The above is emergency legislation and no longer operative.

2121. Machine-gun companies.— * * * *Provided further*, That the President in his discretion may organize, officer, and equip for each Infantry and Cavalry brigade three machine-gun companies, and for each Infantry and Cavalry division four machine-gun companies, all in addition to the machine-gun

companies comprised in organizations included in such brigades and divisions:

* * * *Par. 3, sec. 1, act of May 18, 1917 (40 Stat. 77).*

The above is emergency legislation and no longer operative.

The composition of a machine-gun company of Infantry and a machine-gun troop of Cavalry was provided for by secs. 17 and 18, respectively, of the act of June 3, 1916, repealed by the correspondingly numbered sections of the act of June 4, 1920 (41 Stat. 769-770).

2122. Armored motor-car companies.— * * * *Provided further, That the President in his discretion may organize for each division one armored motor-car machine-gun company. The machine-gun companies organized under this section shall consist of such commissioned and enlisted personnel and be equipped in such manner as the President may prescribe: * * * Par. 3, sec. 1, act of May 18, 1917 (40 Stat. 77).*

The above is emergency legislation and no longer operative.

2123. Military headquarters.— * * * *Provided, That when the economy of the service requires, the Secretary of War shall direct the establishment of military headquarters at points where suitable buildings are owned by the government. Sec. 8, act of June 23, 1879 (21 Stat. 35).*

This proviso, from the Army appropriation act for the fiscal year 1880, repealed sec. 6, act of June 18, 1878 (20 Stat. 150), requiring that in time of peace military headquarters should be in buildings or barracks owned by the Government unless the Secretary of War should order otherwise.

2124. Composition of the Infantry.—The Infantry shall consist of one Chief of Infantry with the rank of major general; four thousand two hundred officers in grades from colonel to second lieutenant, inclusive, and one hundred and ten thousand enlisted men, organized into such Infantry units as the President may direct. Hereafter all tank units shall form a part of the Infantry. *Sec. 17, act of June 3, 1916 (39 Stat. 177), as amended by sec. 17, act of June 4, 1920 (41 Stat. 769).*

The Infantry is designated as a combatant arm or of the line of the Army, by sec. 2 of said act of June 4, 1920, ante, 2118.

Sec. 17, act of June 3, 1916, as originally enacted, provided in detail for the organization of regiments, battalions and various kinds of companies of Infantry, and superseded most of the provisions of sec. 10, act of Feb. 2, 1901 (31 Stat. 750), and a provision of sec. 4, act of Mar. 2, 1890 (30 Stat. 978), prescribing the composition of Infantry bands.

Tank units have succeeded the Tank Corps, first known as the Tank Service, which came into existence by reason of a letter of The Adjutant General of the Army written, by order of the Secretary of War, on Mar. 6, 1918, to the Director of Tank Service, as follows:

"Under authority conferred by sections 1, 2 and 3 of the act of Congress 'To authorize the President to increase temporarily the Military Establishment of the United States,' approved May 18, 1917, the President directs that there be organized for the period of the existing emergency, the enlisted strength to be raised by voluntary enlistment or draft, a Tank Service to consist of:"

1 brigadier general and 913 other officers.

"The officers for this service will be provided as authorized by the 3d paragraph of section 1 and by section 9 of the act approved May 18, 1917.

"The 12 light tank companies and 15 heavy tank companies, the 50 officers not above the rank of captain, and the 25 sergeants which have been heretofore authorized as an increase in the Engineer Corps, National Army, will be transferred to the Tank Service."

Sec. 7-b, G. O. 80, W. D. 1918, directs that the Director of the Tank Corps will operate under the direct supervision of the Chief of Staff, in so far as pertains to purely military matters, and is responsible for the efficiency and preparedness for service of personnel and matériel. The office of the Director was merged into that of the Chief of

Tank Corps on Aug. 15, 1919. The Tank Corps was continued to June 30, 1920, by act of July 11, 1919 (41 Stat. 129). No provision for continuing the Tank Corps as such after June 30, 1920, was made in subsequent legislation.

An appropriation for tanks and other armored motor vehicles to remain available until the end of the fiscal year 1922 was made by act of June 5, 1920 (41 Stat. 972).

2125. Infantry band organization at recruiting depots.— * * * *Provided*, That hereafter one of the companies at each recruiting depot shall have the organization of an infantry band, to which recruits showing an aptitude for music may be attached for examination and instruction before assignment to organizations in the Army. * * * *Act of Mar. 3, 1901 (35 Stat. 745), making appropriations for the support of the Army: Transportation.*

Previous provisions for detachments at recruit depots, and for musicians, etc., thereat, were made by act of June 12, 1906, and act of Mar. 2, 1907, post, 2140.

The existing laws pertaining to or affecting recruiting parties, recruit depots, and unassigned recruits are to continue and remain in force, except as specifically provided otherwise by sec. 22, the national defense act, 2995, post.

2126. Bands of Infantry during the World War.—That the Secretary of War is authorized to organize for use during the present emergency twenty bands additional to those now authorized for the Army to be organized as are bands of Infantry. *Act of July 9, 1918 (40 Stat. 852).*

The above is emergency legislation and no longer operative.

2127. Colored regiments.—The enlisted men of two regiments of Infantry shall be colored men. *R. S. 1108.*

Notes of Decisions.

Enlistment of white men.—The enlistment of white men in colored regiments is prohibited by implication by this section and 2131, post. (1881) 17 Op. Atty. Gen. 47.

2128. Porto Rico Regiment of Infantry.—The Porto Rico Regiment of Infantry and the officers and enlisted men of such regiment shall become a part of the Infantry branch herein provided for, and its officers shall, on July 1, 1920, be recommissioned in the Infantry with their present grades and dates of rank, unless promoted on that date in accordance with the provisions of section 24 hereof. *Sec. 21, act of June 3, 1916 (39 Stat. 180), as amended by sec. 21, act of June 4, 1920 (41 Stat. 770).*

By sec. 37, act of Feb. 2, 1901 (31 Stat. 758), the President was authorized to organize the Porto Rico Provisional Regiment of Infantry, which organization was modified by the Army appropriation act of Apr. 23, 1904 (33 Stat. 206). The name was changed to the Porto Rico Regiment of Infantry of the United States Army by sec. 1, act of May 27, 1908 (35 Stat. 392).

By sec. 21, act of June 3, 1916, the Porto Rico Regiment of Infantry was to have the same organization and the same grades and numbers of commissioned officers and enlisted men as prescribed for other regiments of Infantry of the Army.

2129. Composition of the Cavalry.—The Cavalry shall consist of one Chief of Cavalry with the rank of major general, nine hundred and fifty officers in grades from colonel to second lieutenant, inclusive, and twenty thousand enlisted men, organized into Cavalry units as the President may direct. *Sec. 18, act of June 3, 1916 (39 Stat. 178), as amended by sec. 18, act of June 4, 1920 (41 Stat. 770).*

The Cavalry is designated as a combatant arm or of the line of the Army, by sec. 2 of said act of June 4, 1920, ante, 2118.

Sec. 18, act of June 3, 1916, as originally enacted, provided in detail for the organization of regiments, squadrons and various kinds of troops of Cavalry.

Ten regiments of cavalry were authorized by R. S. sec. 1094, and subsequent statutes, 15 regiments by sec. 1, act of Feb. 2, 1901 (31 Stat. 748), and 25 regiments by sec. 1, act of June 3, 1916 (39 Stat. 166). The composition of each regiment and troop was prescribed by R. S. secs. 1102, 1103, and amendments thereof; a temporary increase of strength was authorized by provisions of act of July 24, 1876 (19 Stat. 98), and several later statutes, among them a provision for increase in time of war, by sec. 3, act of Apr. 26, 1898 (30 Stat. 364); and the composition of each regiment and troop, and the organization of troops into squadrons, were prescribed by sec. 2, act of Mar. 2, 1899 (30 Stat. 977). These provisions were superseded by sec. 2, act of Feb. 2, 1901 (31 Stat. 748), except the clause of the section last mentioned relating to the organization of Cavalry bands, and the further clauses relating to veterinarians.

Said sec. 2 and a provision of sec. 2, act of Mar. 2, 1899, were superseded by sec. 18, act of June 3, 1916, as originally enacted.

Further provisions relating to veterinarians for Cavalry and Artillery regiments were contained in sec. 20, act of Feb. 2, 1901 (31 Stat. 753).

Further provisions relating to the "two farriers and blacksmiths," included in sec. 2, act of Feb. 2, 1901, in each troop of Cavalry, were made by a provision of act of Mar. 28, 1910 (36 Stat. 245).

2130. Dismounted Cavalry.—Any portion of the cavalry force may be armed and drilled as infantry, or dismounted cavalry, at the discretion of the President. *R. S. 1105.*

2131. Organization of Cavalry into Field Artillery or Infantry.—That during the present emergency the President be, and he is hereby, authorized to organize provisionally as Field Artillery or Infantry and to use as Field Artillery or Infantry during the existing emergency such regiments of Cavalry as he may designate: *Provided*, That immediately after the termination of the existing emergency such regiments shall be reorganized as Cavalry regiments in accordance with the prescribed organization of such regiments. *Act of Oct. 6, 1917 (40 Stat. 398).*

The above is emergency legislation and no longer operative.

2132. Colored regiments of Cavalry.—The enlisted men of two regiments of cavalry shall be colored men. *R. S. 1104.*

Notes of Decisions.

Enlistment of white men.—The enlistment of white men in colored regiments is prohibited by implication by this section and 2127, ante. (1881) 17 Op. Atty. Gen. 47.

2133. Artillery divided into Field Artillery and Coast Artillery.—That the artillery of the United States Army shall consist of the Chief of Artillery, the coast artillery, and the field artillery. The coast artillery and the field artillery shall be organized as hereinafter specified, and the artillery shall belong to the line of the Army: *Provided*, That on and after July first, nineteen hundred and eight, the Chief of Artillery shall cease to exercise supervision over the field artillery and shall thereafter be designated as the Chief of Coast Artillery. *Sec. 1, act of Jan. 25, 1907 (34 Stat. 861).*

This act superseded the provisions of secs. 3-9, act of Feb. 2, 1901 (31 Stat. 748, 749), which constituted the Artillery arm of the Army the Artillery Corps, comprising two branches, the Coast Artillery and the Field Artillery, and prescribed the composition of the Artillery Corps and of each company of Coast Artillery and each battery of Field Artillery.

The office of Chief of Artillery was created by sec. 6, act of Feb. 2, 1901 (31 Stat. 749), which provided that the Chief of Artillery should be selected and detailed by the President from the colonels of Artillery, to serve on the staff of the general officer commanding the Army, his duties to be prescribed by the Secretary of War. Said provisions were superseded by those of this section.

By sec. 5, act of Feb. 14, 1903 (32 Stat. 831), it was provided that the Chief of Artillery should serve as an additional member of the General Staff, with the rank, pay, and allowances of a brigadier general, and by sec. 5, act of June 3, 1916 (39 Stat. 168), stricken out by sec. 5, act of June 4, 1920, it was provided that the Chief of Coast Artillery should serve as an additional member of the General Staff Corps and should be advisor to and informant of the Chief of Staff in respect to the business under his charge.

But see 2135 and 2137, post.

2134. Definition of Field Artillery.—That the field artillery is the artillery which accompanies an army in the field, and includes light artillery, horse artillery, siege artillery, and mountain artillery. *Sec. 4, act of Jan. 25, 1907 (34 Stat. 861).*

2135. Composition of the Field Artillery.—The Field Artillery shall consist of one Chief of Field Artillery with the rank of major general, one thousand nine hundred officers in grades from colonel to second lieutenant, inclusive, and thirty-seven thousand enlisted men, organized into Field Artillery units as the President may direct. *Sec. 19, act of June 3, 1916 (39 Stat. 179), as amended by sec. 19, act of June 4, 1920 (41 Stat. 770).*

The office of Chief of Field Artillery was established by par. 1, General Orders, No. 15, War Department, Feb. 10, 1918, which simply detailed a general officer as Chief of Field Artillery (apparently under the power given the President by a proviso in sec. 1, act of May 18, 1917 (40 Stat. 76), "to prescribe such new and different organizations and personnel for Army corps * * * as the efficiency of the service may require"). The first statutory recognition of this office is found in sec. 19, act of June 4, 1920. For the general provision under which the head of a corps was entitled to the rank, pay, and allowances of a major general, see sec. 3, act of October 6, 1917, post, 2342.

The Field Artillery is designated as a combatant arm or of the line of the Army, by sec. 2 of said act of June 4, 1920, ante, 2118.

Sec. 19, act of June 3, 1916, as originally enacted, provided in detail for the organization of regiments, battalions, batteries and companies of Field Artillery. Said sec. 19 superseded secs. 7 and 8, act of Jan. 25, 1907 (34 Stat. 862), and part of a proviso annexed to the Army appropriation act of Mar. 23, 1910 (36 Stat. 245).

Other provisions relating to the Field Artillery Corps, superseded by sec. 19, mentioned above, and prior laws, were contained in sec. 4, act of Apr. 26, 1898 (30 Stat. 365), sec. 2, act of Mar. 2, 1899 (30 Stat. 977), and sec. 20, act of Feb. 2, 1901 (31 Stat. 753).

For division of the Artillery into Coast Artillery and Field Artillery, see 2133, ante.

2136. Definition of the Coast Artillery.—That the coast artillery is the artillery charged with the care and use of the fixed and movable elements of land and coast fortifications, including the submarine mine and torpedo defenses. *Sec. 3, act of Jan. 25, 1907 (34 Stat. 861).*

2137. Composition of the Coast Artillery Corps.—The Coast Artillery Corps shall consist of one Chief of Coast Artillery with rank of major general, one thousand two hundred officers in grades from colonel to second lieutenant, inclusive, the warrant officers of the Army Mine Planter Service as now authorized by law, and thirty thousand enlisted men, organized into such Coast Artillery units as the President may direct. *Sec. 20, act of June 3, 1916 (39 Stat. 180), as amended by sec. 20, act of June 4, 1920 (41 Stat. 770).*

* * * *Provided*, That nothing contained in this Act or any other Act shall be construed as precluding the detail upon duties of a technical or military nature of not to exceed eight warrant officers, or enlisted men of the Coast Artillery Corps, in the Office of the Chief of Coast Artillery. *Act of Mar. 3, 1921 (41 Stat. 1279), making appropriations for legislative, executive, and judicial expenses: Office of Chief of Coast Artillery.*

The Chief of the Coast Artillery was given the rank, pay, and allowances of a brigadier general by a provision in sec. 5, act of Jan. 25, 1907 (34 Stat. 861), which provision was superseded by a provision in sec. 20, act of June 3, 1916 (39 Stat. 180), which provided that the Chief of the Coast Artillery should have the rank of a brigadier general, but omitted the provision as to his pay and allowances. Said provision was in turn superseded by a provision in sec. 1, act of July 6, 1918, 2345, post, which provided that the Chief of Coast Artillery should have the rank, pay, and allowances of a major general. (For general provision under which he would have been so entitled, see sec. 3, act of Oct. 6, 1917, post, 2342.)

Provisions relating to the appointment to fill vacancies in the office of the Chief of Coast Artillery, etc., are contained in sec. 2, act of Jan. 25, 1907, post, 2344.

The Coast Artillery Corps is designated as a combatant arm or of the line of the Army, by sec. 2 of said act of June 4, 1920, ante, 2118.

Sec. 20, act of June 3, 1916, as originally enacted, prescribed the specific number in each commissioned and noncommissioned grade and superseded sec. 5, act of Jan. 25, 1907 (34 Stat. 861), which was equally specific. A provision in the latter section for the organization of the Coast Artillery Corps into 170 companies not being repeated in later enactments, was treated as repealed. (See G. O. 31 and 50, War Dept., 1916, and 98, War Dept., 1917).

Previous provisions prescribing the composition of the Artillery Corps were contained in sec. 6, act of Feb. 2, 1901 (31 Stat. 749). That section superseded the provisions for the composition of regiments of Artillery contained in R. S. 1099, and subsequent statutes, including sec. 2, act of Mar. 8, 1898 (30 Stat. 261), sec. 3, act of Apr. 26, 1898 (30 Stat. 364), and sec. 3, act of Mar. 2, 1899 (30 Stat. 978), which were in turn superseded by said sec. 5, act of Jan. 25, 1907, which provided "That the Coast Artillery shall constitute a corps. * * *"

For provisions as to the Chief of Coast Artillery, see 2133, ante, and notes thereunder.

2138. The Army Mine Planter Service.—That hereafter there shall be in the Coast Artillery Corps of the Regular Army a service to be known as the Army Mine Planter Service, which shall consist, for each mine planter in the service of the United States, of one master, one first mate, one second mate, one chief engineer, and one assistant engineer, who shall be warrant officers appointed by and holding their offices at the discretion of the Secretary of War, and two oilers, four firemen, four deck hands, one cook, one steward, and one assistant steward, who shall be appointed from enlisted men of the Coast Artillery Corps under such regulations as the Secretary of War may prescribe: *Provided*, That the Coast Artillery Corps is hereby increased by such numbers of warrant officers and enlisted men as may be necessary to constitute the force provided by this chapter: * * * *Chap. IX, act of July 9, 1918 (40 Stat. 881).*

But see 2137, ante.

2139. Warrant officers.—In addition to those authorized for the Army Mine Planter Service, there shall be not more than one thousand one hundred and twenty warrant officers, including band leaders, who shall hereafter be warrant officers. Appointments shall be made by the Secretary of War from among noncommissioned officers who have had at least ten years' enlisted service; enlisted men who served as officers of the Army at some time between April 6, 1917, and November 11, 1918, and whose total service in the Army, enlisted and commissioned, amounts to five years; persons serving or who have served as Army field clerks or field clerks, Quartermaster Corps; and, in the case of those who are to be assigned to duty as band leaders, from among persons who served as Army band leaders at some time between April 6, 1917, and November 11, 1918, or enlisted men possessing suitable qualifications. * * * Warrant officers other than those of the Army Mine Planter Service, * * * and shall take rank next below second lieutenants and among themselves according to the dates of their respective warrants. *Sec. 4a, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920 (41 Stat. 761).*

2140. Recruit depot detachments and disciplinary guards.— * * * *Provided further*, That hereafter the Secretary of War shall be authorized to detach from the Army at large such number of enlisted men as may be necessary to perform duty at the various recruit depots and the United States military prison, and of the enlisted men so detached, and while performing such duty, there shall be allowed for each depot and the prison one who shall have the rank, pay, and allowances of battalion or squadron sergeant-major, and for each recruit and prison company one who shall have the rank, pay, and allowances of first sergeant, five the rank, pay, and allowances of sergeant, and six the rank, pay, and allowances of corporal, of the arm of the service to which they respectively belong. *Act of June 12, 1906 (34 Stat. 242).*

* * * *Provided*, That hereafter recruit and prison companies shall have noncommissioned officers, musicians, artificers and cooks of the numbers and grades allowed by law for companies of infantry. *Act of Mar. 2, 1907 (34 Stat. 1160).*

See 2095, post.

2141. Remount detachments.— * * * *Provided further*, That hereafter from the enlisted force of the Army now provided by law the President may authorize the organization of remount detachments at each of the remount depots, and may authorize the appointment therein of such noncommissioned officers, mechanics, artificers, farriers, horseshoers, and cooks as may be necessary for the administration of such remount depots: *Provided*, That nothing herein shall be so construed as to authorize an increase in the total number of enlisted men of the Army now authorized by law. *Act of Mar. 3, 1911 (36 Stat. 1049).*

But see 1671, ante.

2142. Service school detachments.— * * * *Provided*, That from the enlisted force of the army now provided by law the President may authorize the organization of school detachments at each of the service schools, and may authorize the appointment therein of such noncommissioned officers, mechanics, artificers, farriers, horseshoers, and cooks as may be necessary for the administration of such school: *Provided*, That nothing herein shall be construed as to authorize an increase in the total number of enlisted men of the army now authorized by law. *Act of Mar. 3, 1909 (35 Stat. 733).*

See 2095, post.

2143. General provision for service schools.—To provide means for the theoretical and practical instruction at the Army Service Schools (including the General Staff School, the School of the Line, and the Signal Corps School at Fort Leavenworth, Kansas, the Army Field Service School and Correspondence School for Medical Officers, at Washington, District of Columbia, the Cavalry School at Fort Riley, Kansas, the Field Artillery Schools at Fort Sill, Oklahoma, and at Camp Zachary Taylor or Camp Knox, Kentucky, and for the Infantry School at Camp Benning, Georgia) by the purchase of textbooks, books of reference, scientific and professional papers, the purchase of modern instruments and material for the theoretical and practical instruction, employment of temporary, technical, or special services, and for all absolutely necessary expenses, to be allotted in such proportion as may, in the opinion of the Secretary of War, be for the best interests of the military service. * * * *Act of June 5, 1920 (41 Stat. 950), making appropriations for the support of the Army: United States Service Schools.*

For complete list of service schools see par. 449, A. R., 1913.

The Infantry and Cavalry School was established at Fort Leavenworth, Kans., in pursuance of General Orders, No. 42, Adjutant General's Office, of May 7, 1881. Although not created by statute, its existence was recognized by Congress in several acts of appropriation, beginning with the act of Mar. 2, 1889. It has been superseded by the "Army School of the Line," which was first recognized by statute in the act of Mar. 3, 1909 (35 Stat. 733).

2144. Infantry School.—For the construction of the necessary buildings for the Infantry School at Camp Benning, Georgia, including the installation of plumbing, heating, lighting, roads and walks, the sum of \$1,000,000, remaining from "General Appropriations, Quartermaster Corps," for the fiscal year ending June 30, 1919, is hereby appropriated and made immediately available and shall be available until expended: *Provided*, That section 1136, Revised Statutes, and the provision contained in the Sundry Civil Appropriation Act of June 25, 1910 (Thirty-sixth Statutes, page 721), prescribing limitations as to the cost of certain structure, shall not apply to structures to be constructed under this project. *Act of June 5, 1920 (41 Stat. 963), making appropriations for the support of the Army: Buildings for Infantry Schools.*

For R. S. 1136, see 1149, ante.

For act of June 25, 1910 (36 Stat. 721), see 1157, ante.

2145. Tank Corps schools.—Incidental expenses in connection with the operation of the Tank Corps schools, \$5,000. *Act of June 5, 1920 (41 Stat. 974), making appropriations for the support of the Army: Tank Corps Schools.*

2146. The Mounted Service School.—That the Secretary of War be, and he is hereby, authorized and directed to establish upon the military reservation at Fort Riley a permanent school of instruction for drill and practice for the cavalry and light artillery service of the Army of the United States, and which shall be the depot to which all recruits for such service shall be sent; * * * *Act of Jan. 29, 1887 (24 Stat. 372).*

A further provision of the section making an appropriation for construction of quarters, etc., to carry into effect the purposes of the act is omitted here as temporary merely and executed.

The Cavalry and Light Artillery School was established in pursuance of the act of Jan. 29, 1887, by General Orders, No. 17, Adjutant General's Office, of Mar. 14, 1892. See also in connection with this school the acts of Oct. 2, 1888 (25 Stat. 534), and Mar. 2, 1889 (id. 906). This school has been superseded by the "Mounted Service School at Fort Riley, Kans.," and provision has been made therefor under that title beginning with the act of Mar. 3, 1909 (35 Stat. 733).

2147. Field Artillery schools.—To provide means for the theoretical and practical instruction in Field Artillery activities at the three brigade firing centers at Fort Sill, Oklahoma, Camp Bragg, North Carolina, and Camp Knox, Kentucky, by the purchase of modern instruments and material for theoretical and practical instruction, for the tuition of officers detailed as students at civil educational institutions, and for all other necessary expenses, to be allotted in such proportion as may, in the opinion of the Secretary of War, be for the best interests of the service, \$6,000. *Act of June 5, 1920 (41 Stat. 950), making appropriations for the support of the Army: Field Artillery activities.*

In the act of Aug. 24, 1912 (37 Stat. 570), under the appropriation for "United States Service Schools" provision is made for a "School of Fire for Field Artillery at Fort Sill, Okla.," and this provision was continued in later acts.

2148. Coast Artillery School.—For incidental expenses of the school, including chemicals, stationery, printing, and binding; hardware; materials; cost of special instruction of officers detailed as instructors; employment of temporary,

technical, or special services; * * * for office furniture and fixtures, machinery, motor trucks, and unforeseen expenses, \$11,600. *Act of June 5, 1920 (41 Stat. 951), making appropriations for the support of the Army: Coast Artillery School.*

The Artillery School was established at Fortress Monroe, Va., in pursuance of General Orders, No. 18, Adjutant General's Office, of Apr. 5, 1824. It ceased to exist in 1835 by reason of the transfer of the troops composing the school to other duties. It was reestablished by General Orders, No. 9, Adjutant General's Office, of Oct. 30, 1856. A code of regulations and plan of instruction was approved by the Secretary of War and published to the Army in General Orders, No. 5, Adjutant General's Office, of May 18, 1858. The school was again discontinued at the outbreak of the War of the Rebellion in 1861. It was reorganized by General Orders, No. 99, Adjutant General's Office, of Nov. 13, 1867. Although not created by statute, its existence has been recognized and the courses of study pursued have been sanctioned by Congress in several acts of appropriation. See the various acts of appropriation from that of June 20, 1878 (20 Stat. 228). It was first appropriated for as the "Coast Artillery School" in the act of Mar. 3, 1909 (35 Stat. 733).

2149. Engineer School.—Equipment and maintenance of the Engineer School, including purchase and repair of instruments, machinery, implements, models, boats, and materials for the use of the school and to provide means for the theoretical and practical instruction of Engineer officers and troops in their special duties as sappers and miners; for land mining, pontoniering, and signaling; for purchase and binding of scientific and professional works, papers, and periodicals treating on military engineering and scientific subjects, textbooks, and books of reference for the library of the United States Engineer School; for incidental expenses of the school, including chemicals, stationery, hardware, machinery, and boats; for pay of civilian clerks, draftsmen, electricians, mechanics, and laborers; compensation of civilian lecturers and payment of tuition fees of student officers at civil technical institutions; for unforeseen expenses; * * * *Act of June 5, 1920 (41 Stat. 969), making appropriations for the support of the Army: Engineer School.*

The United States Engineer School was established by Executive order, but has been recognized in the several acts of appropriation from the act of Mar. 3, 1873 (17 Stat. 546). It was originally located at Fort Totten, Willets Point, N. Y., but was removed in 1902 to Washington Barracks, D. C. See General Orders, 155, A. G. O., Nov. 27, 1901.

2149}. General Staff College.—For expenses of the General Staff College, being for the purchase of the necessary stationery; typewriters and exchange of same; office, toilet, and desk furniture; textbooks, books of reference, scientific and professional papers and periodicals; printing and binding; maps; police utensils; the necessary fuel for heating the General Staff College Building and for lighting the building and grounds; employment of temporary technical or special services and expenses of special lectures; and for all other absolutely necessary expenses, including \$25 per month additional to regular compensation to chief clerk for superintendence of the General Staff College Building; also for pay of a chief engineer at \$1,400, an assistant engineer at \$1,000, a carpenter at \$1,000, four firemen at \$720 each, an elevator conductor at \$720; in all, \$25,000. *Act of June 5, 1920 (41 Stat. 949), making appropriations for the support of the Army: General Staff College.*

The Army War College was established in accordance with the act of May 26, 1900 (31 Stat. 209), which made an appropriation " * * * for contingent expenses incident to the establishment of the Army War College, having for its object the direction and co-ordination of the instruction in the various service schools, extension of the opportunities for investigation and study in the Army and Militia of the United States, and the collec-

tion and dissemination of military information, * * *." Appropriations were made therefor annually thereafter, ending with the act of July 9, 1919 (41 Stat. 105). By virtue of paragraphs 192 and 193, Special Orders No. 141—O, W. D., June 17, 1919, and of a letter dated June 18, 1919, from The Adjutant General of the Army to the commanding officer, Washington Barracks, D. C., the name Army War College was changed to General Staff College. The objects of the General Staff College are set forth in General Orders No. 112, W. D., 1919, and the above appropriation was made therefor.

2150. Indian Scouts.—The President is authorized to enlist a force of Indians not exceeding one thousand, who shall act as scouts in the Territories and Indian country. They shall be discharged when the necessity for their service shall cease, or at the discretion of the department commander. *R. S. 1112.*

That so much of the army appropriation act of twenty-fourth July, eighteen hundred and seventy-six, as limits the number of Indian scouts to three hundred is hereby repealed; and sections ten hundred and ninety-four and eleven hundred and twelve of the Revised Statutes, authorizing the employment of one thousand Indian scouts, are hereby continued in force: *Provided*, That a proportionate number of noncommissioned officers may be appointed. * * * *Act of Aug. 12, 1876 (19 Stat. 131).*

A force of Indian scouts, not exceeding 1,000, was authorized by R. S. 1094, as well as by this section. The Army appropriation act of July 24, 1876 (19 Stat. 97), provided payment for only 300 Indian scouts. But the implied limitation was repealed, and the provisions of R. S. 1094, 1112, authorizing the employment of 1,000 Indian scouts, were continued in force, and other provisions relating to such scouts were made by act of Aug. 12, 1876 (19 Stat. 131). "Indian scouts as now authorized by law" were included in the composition of the Army by sec. 1, act of Feb. 2, 1901, but were omitted from the composition of the Regular Army by sec. 2, act of June 3, 1916. Indian scouts are included in sec. 2, act of June 4, 1920, ante, 2118. The enlistment of natives of the Philippine Islands, to be organized as scouts, was authorized by sec. 36 of that act, 2151, post.

But see 2995, post.

Notes of Decisions.

Scouts as part of Army.—The Indian Scouts provided for in this section form an integral part of the Army. (1880) 16 Op. Atty. Gen. 451.

2151. Organization of Philippine Scouts.—That when in his opinion the conditions in the Philippine Islands justify such action the President is authorized to enlist natives of those islands for service in the Army, to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this Act, for the Regular Army. The President is further authorized, in his discretion, to form companies, organized as are companies of the Regular Army, in squadrons or battalions, with officers and noncommissioned officers corresponding to similar organizations in the cavalry and infantry arms. The total number of enlisted men in said native organizations shall not exceed twelve thousand. * * * *Sec. 36, act of Feb. 2, 1901 (31 Stat. 757).*

"The President is authorized to form the Philippine Scouts into such branches and tactical units as he may deem expedient, within the limit of strength prescribed by law, organized similarly to those of the Regular Army, the officers to be detailed from those authorized in section 4 hereof. * * * Nothing in this Act shall be construed to alter in any respect the present status of enlisted men of the Philippine Scouts." *Sec. 22a, added to the act of June 3, 1916, by sec. 22, act of June 4, 1920 (41 Stat. 770).*

By sec. 36, act of Feb. 2, 1901, ante, 1633, it was provided that the pay and allowances of provisional officers of native organizations should be the same as for officers of like grade in the Regular Army.

But see 2995, post.

2151½. Slavic Legion.—That, under such regulations as the President may prescribe, a force of volunteer troops in such unit or units as he may direct may be raised to be composed of Jugo-Slavs, Czecho-Slovaks, and Ruthenians (Ukrainians) belonging to the oppressed races of the Austro-Hungarian or German Empire resident in the United States but not citizens thereof nor subject to the draft. Such force shall be known as the Slavic Legion or by such other description as the President may prescribe. No man shall be enlisted in it until he has furnished satisfactory evidence that he will faithfully and loyally serve the cause of the United States and that he desires to fight the Imperial governments of Germany and Austro-Hungary, and the allies thereof. The force so raised and duly sworn into the service may be equipped, maintained, and trained with our own troops or separately as the President may direct and thereafter may be transported to such field of action as the President may direct to be used against the common enemy in connection with our own troops or with those of any nation associated with the United States in the present war; and the several items of expense involved in the equipment, maintenance, training, and transportation of such force may be paid from the respective appropriations herein made or from any subsequent appropriations for the same: *Provided*, That American citizens of Austrian or German birth, or who were born in alien enemy territory, who have passed the necessary examination and whose loyalty is unquestioned, may, in the discretion of the Commander in Chief of the Army and Navy, be commissioned in the United States Army or Navy. *Act of July 9, 1918 (40 Stat. 868).*

2152. Voting in Territories.— * * * Third. No officer, soldier, seaman, mariner, or other person in the Army or Navy, or attached to troops in the service of the United States, shall be allowed to vote in any Territory, by reason of being on service therein, unless such Territory is, and has been for the period of six months, his permanent domicile. * * * *R. S. 1860.*

2153. Laundresses not to accompany troops.—That hereafter women shall not be allowed to accompany troops as laundresses: * * * *Sec. 5, act of June 18, 1878 (20 Stat. 150).*

This section superseded R. S. 1240.

A further provision of this section, authorizing the retention of any laundress, being the wife of a soldier, then allowed to accompany troops, until the expiration of his term of enlistment, is omitted here, as temporary only.

2154. Cooperation by the Coast and Geodetic Survey with the War and Navy Departments.—* * * The Secretary of War, the Secretary of the Navy, and the Secretary of Commerce shall jointly prescribe regulations governing the duties to be performed by the Coast and Geodetic Survey in time of war, and for the cooperation of that service with the War and Navy Departments in time of peace in preparations for its duties in war, which regulations shall not be effective unless approved by each of the said Secretaries, and included therein may be rules and regulations for making reports and communications between the officers or bureaus of the War and Navy Departments and the Coast and Geodetic Survey. *Sec. 16, act of May 22, 1917 (40 Stat. 83).*

2155. Personnel of the Coast and Geodetic Survey under military jurisdiction.—* * * Nothing in this Act shall reduce the total amount of pay and allowances they were receiving at the time of transfer. * * *

* * * *Provided further*, That any of the personnel of the Coast and Geodetic Survey who may be transferred as herein provided shall, while under the jurisdiction of the War Department or Navy Department, have proper military status and shall be subject to the laws, regulations, and orders for the government of the Army or Navy, as the case may be, in so far as the same may be applicable to persons whose retention permanently in the military service of the United States is not contemplated by law: * * * *Sec. 16, act of May 22, 1917 (40 Stat. 88).*

2156. Cooperation of the Lighthouse Service with the War Department.—The Secretary of the Navy, the Secretary of War, and the Secretary of Commerce shall jointly prescribe regulations governing the duties to be performed by the Lighthouse Service in time of war, and for the cooperation of that service with the Navy and War Departments in time of peace in preparation for its duties in war, and this may include arrangements for a direct line of communication between the officers or bureaus of the Navy and War Departments and the Bureau of Lighthouses to provide for immediate action on all communications from these departments. *Act of Aug. 29, 1916 (39 Stat. 602).*

2157. Personnel of the Lighthouse Service under military jurisdiction.—* * * *Provided further*, That any of the personnel of the Lighthouse Service who may be transferred as herein provided shall, while under the jurisdiction of the Navy Department or War Department, be subject to the laws, regulations, and orders for the government of the Navy or Army, as the case may be, in so far as the same may be applicable to persons whose retention permanently in the military service of the United States is not contemplated by law. *Act of Aug. 29, 1916 (39 Stat. 602).*

2158. American National Red Cross attached to the Army in time of war.—That whenever in time of war, or when war is imminent, the President may deem the cooperation and use of the American National Red Cross with the sanitary services of the land and naval forces to be necessary, he is authorized to accept the assistance tendered by the said Red Cross and to employ the same under the sanitary services of the Army and Navy in conformity with such rules and regulations as he may prescribe. *Sec. 1, act of April 24, 1912 (37 Stat. 90).*

2159. Emergency forces organized like the Regular Army.—* * * *Third.* * * * *Provided*, That the organization of said force shall be the same as that of the corresponding organizations of the Regular Army: * * * *Sec. 1, act of May 18, 1917 (40 Stat. 76).*

The above is emergency legislation and no longer operative.

2160. Units of the emergency forces to be composed of men from the same locality.—* * * Organizations of the forces herein provided for, except the Regular Army and the divisions authorized in the seventh paragraph of section one, shall, as far as the interests of the service permit, be composed of men who come, and of officers who are appointed from, the same State or locality. *Sec. 2, act of May 18, 1917 (40 Stat. 78).*

* * * *Provided*, That all persons enlisted or drafted under any of the provisions of this Act shall as far as practicable be grouped into units by States and the political subdivisions of the same: * * * *Sec. 7, act of May 18, 1917 (40 Stat. 81).*

The above is emergency legislation and no longer operative.

2161. Training units for the emergency forces.— * * * Fifth. To raise by draft, organize, equip, and officer, as provided in the third paragraph of this section, in addition to and for each of the above forces, such recruit training units as he may deem necessary for the maintenance of such forces at the maximum strength. * * * *Sec. 1, act of May 18, 1917 (40 Stat. 77).*

The above is emergency legislation and no longer operative.

2162. Ammunition batteries and artillery parks for the World War.— * * * Sixth. To raise, organize, officer, and maintain during the emergency such number of ammunition batteries and battalions, depot batteries and battalions, and such artillery parks, with such numbers and grades of personnel as he may deem necessary. Such organizations shall be officered in the manner provided in the third paragraph of this section, and enlisted men may be assigned to said organizations from any of the forces herein provided for or raised by selective draft as by this Act provided. * * * *Sec. 1, act of May 18, 1917 (40 Stat. 77).*

The above is emergency legislation and no longer operative.

2163. Special and technical troops raised for the World War.— * * * *Provided,* That the President is authorized to raise and maintain by voluntary enlistment or draft, as herein provided, special and technical troops as he may deem necessary, and to embody them into organizations and to officer them as provided in the third paragraph of section one and section nine of this Act. * * * *Sec. 2, act of May 18, 1917 (40 Stat. 78).*

The above is emergency legislation and no longer operative.

2164. Emergency forces subject to military laws and regulations.— * * * All persons drafted into the service of the United States and all officers accepting commissions in the forces herein provided for shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army, except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law, and those drafted shall be required to serve for the period of the existing emergency unless sooner discharged: * * * *Sec. 2, act of May 18, 1917 (40 Stat. 78).*

The above is emergency legislation and no longer operative.

See notes to 2239, post.

CHAPTER 34.

ENLISTED MEN.

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2165. Qualifications for enlistment.—Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment. This limitation as to age shall not apply to soldiers reenlisting. *R. S. 1116.*

* * * *Provided*, That the limits of age for original enlistments in the Army shall be eighteen and thirty-five years. *Sec. 4, act of Mar. 2, 1899 (30 Stat. 978).*

Sec. 11, act of Mar. 16, 1802 (2 Stat. 134), fixed the age of recruits at between the ages of 18 and 35 years, and provided that no person under the age of 21 years should be enlisted or held in the service without the consent of his parent, guardian, or master. The provision in sec. 11, act of Mar. 16, 1802, was repeated in sec. 11, act of Jan. 11, 1812 (2 Stat. 672), except that the maximum age was fixed at 45 years. It was again

repeated in sec. 5, act of Jan. 20, 1813 (2 Stat. 792), the maximum age being fixed at 45 years. By sec. 3, act of Dec. 10, 1814 (3 Stat. 147), the provision requiring the consent of parents, etc., was repealed. By sec. 7, act of Mar. 3, 1815 (3 Stat. 225), it was provided that the Army should be recruited in accordance with the provisions of act of Mar. 16, 1802, thereby repealing the provision in sec. 3, act of Dec. 10, 1814, which did away with the consent of parents. See *In re McDonald* (D. C. 1866), Fed. Cns. No. 8,752. By sec. 5, act of Sept. 28, 1850 (9 Stat. 507), it was provided that the Secretary of War should discharge soldiers who at the time of their enlistment were under 21 years of age, upon evidence that such enlistments were made without the consent of parents or guardians. Sec. 2, act of Feb. 13, 1862 (12 Stat. 339), repealed the provision of sec. 5, act of Sept. 28, 1850, relating to the discharge of minors enlisted without consent of parents, etc., provided that no persons under the age of 18 years should be enlisted, and made the oath of enlistment conclusive as to age. Sec. 20, act of Feb. 24, 1864 (13 Stat. 10), provided that the Secretary of War might order the discharge of all persons in the military service under the age of 18 years at the time of application for their discharge, upon proof of nonconsent of their parents or guardians. Sec. 5, act of July 4, 1864 (13 Stat. 380), made the provision of sec. 20, act of Feb. 24, 1864, relating to the discharge of minors, obligatory upon the Secretary of War, provided for the discharge of all persons subsequently enlisted under the age of 18 years without the consent of parents or guardians, and provided for the punishment of recruiting officers enlisting persons under the age of 16 years without such consent. Secs. 17, 18, act of Mar. 3, 1865 (13 Stat. 489), provided for the punishment of recruiting agents, etc., knowingly procuring the enlistment of minors between the ages of 16 and 18 years without the consent of their parents or guardians, or of minors under the age of 16 (at all), and provided for the punishment of officers receiving the enlistment of such minors. Sec. 1, act of May 15, 1872, provided that no person under the age of 21 years shall be enlisted or mustered into the military service of the United States without the written consent of their parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control (which was the law prior to the enactment of this section).

Provisions that in time of peace no recruit should be enlisted for the first time who was over 30 years of age, and that no private should be reenlisted who had served 10 years or more or who was over 35 years of age, except such as should have already served as enlisted men for 20 years and upward, were contained in the Army appropriation act for the fiscal year 1894, act of Feb. 27, 1893 (27 Stat. 486). The provision relating to reenlistment was repealed by sec. 1, act of Aug. 1, 1894 (28 Stat. 215), and the provision relating to first enlistment was superseded and other requirements for enlistment and reenlistment were prescribed by sec. 2 of said act, 2177, 2160, *post*.

R. S. 1120 provided for the payment of a premium of \$2 for each accepted recruit brought to a recruiting rendezvous. That section was repealed by act of May 12, 1917 (40 Stat. 53).

The President was authorized, in his discretion, to utilize the services of postmasters of the second, third, and fourth classes in procuring the enlistment of recruits for the Army, the postmaster procuring his enlistment to receive the sum of \$5 for each recruit accepted, sec. 27, act of June 3, 1916 (39 Stat. 186), which payment was discontinued by sec. 11, act of July 2, 1918 (40 Stat. 754).

Notes of Decisions.

See notes to 2169, *post*.

Nature of enlistment.—Enlistments in the Army, made under the inducements held out by the laws of the United States, are contracts; and, although the Government be a party, the contracts ought to be construed according to those well-established principles which regulate contracts generally. (1853) 6 Op. Atty. Gen. 187. So, also, it has been held that enlistment in a volunteer regiment organized under act Cong. May 8, 1861, was a contract with the State, and not with the United States, and was not affected by any authority given or limitation fixed by the laws of the

United States. *Lanahan v. Birge* (1862), 30 Conn. 438.

The engagements of the Crown with those in the military service are purely voluntary. [1920] 3 K. R. 663.

Qualifications for enlistment in general.—Any person liable to be drafted may voluntarily enlist. *Lanahan v. Birge* (1862), 30 Conn. 438. An alien may be lawfully enlisted. (1854) 6 Op. Atty. Gen. 474. But see (1841) 3 Op. Atty. Gen. 670.

Persons of African descent may be enlisted as soldiers. (1864) 11 Op. Atty. Gen. 53.

Validity of enlistment in general.—This section does not render void a voluntary enlistment of one not possessing the required qualifications. *U. S. v. Cottingham* (Va. 1843), 1 Rob. 615, 40 Am. Dec. 710.

Fraudulent representations, etc.—A man, who has enlisted on his representation that he was only 28 years of age, can not, on his trial for desertion, plead that he was never properly enlisted, because he was at the time of the enlistment over 35 years of age. *U. S. v. Grimley* (1890), 11 Sup. Ct. 54, 137 U. S. 147, 34 L. Ed. 636, reversing (C. C. 1889), 38 Fed. 84.

Where an enlistment was procured by fraudulent representations on the part of the recruiting officer, or by mistake of fact of one ignorant of the English language, the person so enlisting will be discharged on habeas corpus. *Schmelder v. Barney* (C. C. 1875), Fed. Cas. No. 12,462.

Unauthorized agreements.—On habeas corpus, it was no ground for discharge that relators were enlisted as musicians under an agreement with the recruiting officer that they should remain in Philadelphia,

but were subsequently ordered to Governor's Island, N. Y. *Commonwealth v. Fox* (1848), 7 Pa. Law J. 287.

Ratification.—A contract of enlistment irregularly made may be ratified by the receipt of rations and clothing, and the performance of duties as a recruit for 20 days. *In re Ferrans* (D. C. 1869), Fed. Cas. No. 4,746.

Completion of enlistment.—To become a fully enlisted man the party must sign the prescribed application and then be accepted and sworn into the service. *Coe v. U. S.* (1909), 44 Ct. Cl. 419. And see *Tyler v. Pomeroy* (1864), 90 Mass. (8 Allen) 480, holding that merely signing a paper, in the hands of a municipal officer, containing a promise to serve as a volunteer for three years from the date of being mustered into the United States service, unless sooner discharged, was not sufficient to constitute one a soldier, and render him liable to be seized against his will and taken into camp.

Enlistment of miners.—See 2169, post.

2166. Citizenship and literacy of recruits.— * * * and in time of peace no person (except an Indian) who is not a citizen of the United States, or who has not made legal declaration of his intention to become a citizen of the United States, or who can not speak, read, and write the English language, or who is over thirty years of age, shall be enlisted for the first enlistment in the Army: * * * *Sec. 2, act of Aug. 1, 1894* (28 Stat. 216).

That so much of the Act of Congress entitled "An Act to regulate enlistments in the Army of the United States," approved August 1, 1894, as provides that "in time of peace no person (except an Indian) who can not speak, read, and write the English language" be, and the same is hereby repealed. *Act of June 14, 1920* (41 Stat. 1077), partially repealing *sec. 2, act of Aug. 1, 1894* (28 Stat. 216).

The word "thirty," in the provision of this section relating to age at the time of first enlistment, was superseded by the provision fixing the limits of age for original enlistments at 18 and 35 years, 2165, ante.

Notes of Decisions.

Aliens.—As to enlistment of aliens under laws prior to the enactment of this section (or in the absence of any law), see (1841) 3 Op. Atty. Gen. 671; (1854) 6 Op.

Atty. Gen. 474; *In re Ross* (1842), 1 N. Y. Leg. Obs., 341; *U. S. v. Wyngoll* (N. Y. 1843), 5 Hill, 16; *Same v. Cottingham* (Va. 1843), 1 Rob. 615, 40 Am. Dec. 710.

2167. Enlistment of Porto Ricans in the Regular Army.— * * * *Provided*, That citizens of Porto Rico shall be eligible for enlistment in the Regular Army * * * *Act of March 2, 1903* (32 Stat. 934), making appropriations for the support of the Army.

2168. Persons not to be enlisted.—No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of any criminal offense, shall be enlisted or mustered into the military service. *R. S. 1118*.

Section eleven hundred and eighteen is amended by striking out the words "any criminal offence" in the third line, and inserting the words "a felony." *Act of Feb. 27, 1877 (19 Stat. 242), amending R. S. 1118.*

The word "sixteen," in this section was superseded by the provision fixing the limits of age for original enlistments at 18 and 35 years, 2165, ante.

For the penalty on an officer knowingly making a false enlistment, see art. 55, Articles of War, ch. 52, post.

For persons not to be reenlisted, see 2177, post.

Notes of Decisions.

Minors.—See 2169, post, and notes thereunder.

Insane or intoxicated persons.—The enlistment of one who is insane or intoxicated at the time of his enlistment is void. *In re Cosenow (C. C. 1889), 37 Fed. 668, 669.*

Deserters.—A deserter who enlists and afterwards again deserts can not, on being brought to trial for the second offense, defend on the ground that his enlistment was void, and that he therefore was not amenable to trial. *In re McVey (D. C. 1885), 23 Fed. 878, 879.*

A convicted deserter, undergoing sentence, must become the recipient of executive clemency and must make application

for reenlistment before the question of the effect of the President's pardon upon his right to reenlist can arise. (1897) 21 Op. Atty. Gen. 568.

Under this section a person convicted of desertion from the military service and afterwards pardoned by the President would be restored by reason of the pardon to all the rights and privileges of a citizen which he had anterior to such conviction. (1898) 22 Op. Atty. Gen. 36. But a recruiting officer has the right to reject a candidate for enlistment whose service during his previous term was not honest and faithful, notwithstanding the pardon of the offense. *Id.*

Aliens.—See notes to 2166, ante.

2169. Enlistment of minors.— * * * *Provided further, That no person under the age of eighteen years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control; * * * Sec. 27, act of June 3, 1916 (39 Stat. 186).*

This section superseded R. S. 1117, which provided that no person under the age of 21 years should be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided such minor had such parents or guardians entitled to his custody and control.

For penalty on an officer knowingly making a false enlistment, see A. W. 55, ch. 52, post.

Notes of Decisions.

Military service.—The words "military service" include the Volunteer Army as well as the Regular Army, having the same meaning as the same words in sec. 5, act of July 4, 1864, and secs. 17, 18, act of Mar. 3, 1865, which were acts clearly relating to the Volunteer Army. *In re Burns (C. C. 1898), 87 Fed. 796, 797; appeal dismissed, U. S. v. Burns 1898), 100 Fed. 1005, 40 C. C. A. 688; contra, see Lanahan v. Birge (1862), 30 Conn. 438.*

Construction.—This section superseded R. S. 1117, and therefore the consent of the parent of one over 18 years of age is not necessary to the validity of his enlistment or muster into the military service. *In re Brockman (Sup. Ct. D. C., 1917), 45 Wash. L. R. 133.*

Enlistment of minors.—The enlistment of an infant was good at the common law. *Commonwealth v. Gamble (Pa. 1824), 11 Serg. & R. 93; U. S. v. Lipscomb (Va. 1847), 4 Grat. 41.*

Unquestionably Congress has constitutional power to enlist minors in the Army without the consent of their parents. *U. S. v. Bainbridge (C. C. 1816), Fed. Cas. No. 14,497. And see Commonwealth v. Murray (Pa. 1812), 4 Bin. 487, 5 Am. Dec. 412; Same v. Barker (Pa. 1813), 5 Bin. 423; Same v. Biddle (1846), Brightly, N. P. 447, 4 Clark, 35, 6 Pa. Law J. 288; Same v. Fox (1847), 7 Pa. St. (7 Barr) 836, 7 Pa. Law J. 227.*

Owing to the fact that the law in respect to the enlistment of minors has been

changed from time to time, as indicated by the summary thereof, under 2165, ante, the decisions of the courts thereon have not always been uniform. Under the law as it was prior to act of May 15, 1872, minors above the age of 18 might lawfully be enlisted without the consent of parents or guardians, they might lawfully be mustered into service between the ages of 16 and 18 with the consent of parents or guardians, and they could not be mustered into service under the age of 16. Said act of May 15, 1872, only so far modified the previous law as to prohibit the enlistment of persons under the age of 21, who have parents or guardians entitled to their custody and control without the written consent of such parents or guardians, leaving in full force the provision making the oath of enlistment conclusive as to the age of the recruit, (1873) 14 Op. Atty. Gen. 210.

Act of Feb. 13, 1862, providing that enlistments by minors under 18 years of age should be absolutely void, was held not to repeal by implication the acts requiring consent of parents to minors' enlistments; and that minor over 18 years of age, enlisted without his parents' consent, could still be discharged. *Commonwealth v. Carter* (Pa. 1863), 20 Leg. Int. 21. And it has been held, under these statutes, that the enlistment of a minor in the Army was illegal, unless made with the consent of his parents or guardians. *Ex parte Burke* (D. C. 1863), Fed. Cas. No. 2,156a. [C. S. p. 3714.] Also that the enlistment of a minor without the consent of his parents or guardian was void as to such parent or guardian, although the minor consented to remain in the Army. *Commonwealth v. Harrison* (1814), 11 Mass. 63; *Commonwealth v. Biddle* (Pa. 1846), Brightly, N. P. 447. Also that the enlistment of a minor under the minimum specified age was absolutely void, and he could not be held to service. In *re Riley* (D. C. 1867), Fed. Cas. No. 11,834; In *re Davison* (C. C. 1884), 21 Fed. 618; In *re Hearn* (D. C. 1887), 32 Fed. 141, 142; *Wantlan v. White* (1862), 19 Ind. 470. And that no consent can give power to enlist a minor under such age, nor validate such enlistment while the minor continues under such age. *Wantlan v. White* (1862), 19 Ind. 470. And that an enlisted minor, who has not been mustered into the service nor received any rations or clothing, can not be held in custody as a volunteer. *Bamfield v. Abbot* (D. C. 1847), Fed. Cas. No. 832.

It is now settled law that a minor who enlists without consent of parent or guardian, when such consent is required, becomes a soldier. His enlistment, in the absence of fraud or duress, is not void, nor

is it voidable by him. He may only be released by timely application of his parent or guardian and before he has rendered himself liable to court-martial for an offense against military law (such as fraudulent enlistment, desertion, etc.). *Morrissey v. Perry* (1890), 137 U. S. 157; *Ex parte Dostal* (D. C. 1917), 243 Fed. 664, 669; *Ex parte Rush* (D. C. 1917), 246 Fed. 172; *Reed v. Cushman* (C. C. A. 1917), 251 Fed. 872; *Hoskins v. Dickerson* (C. C. A. 1917), 239 Fed. 275; *Ex parte Beaver* (D. C. 1921), 271 Fed. 493, where the authorities are collected. [C. S., p. 3715.]

R. S. 1118 renders the enlistment of a minor under 16 years of age absolutely void. *Hoskins v. Pell* (C. C. A. 1917), 239 Fed. 279; In *re Lawler* (D. C. 1890), 40 Fed. 223. But see In *re Cosenow* (C. C. 1889), 37 Fed. 668, 670.

It is voidable at the instance of the parent or guardian. *Com. v. Blake*, 8 Phil. 523; *Turner v. Wright*, 5 id. 296; *Menges v. Camac*, 1 Serg. and R. 87; *Henderson v. Wright*, id. 290; *Seavey v. Seymour*, 3 Cliff. 439; In *re Cosenow*, 37 Fed. 668; In *re Hearn*, 32 id. 141; In *re Davison*, 21 id. 618; U. S. v. *Wagner*, 24 id. 135; In *re Dohrendorf*, 40 Fed. 148; In *re Spencer*, id. 149; In *re Lawler*, id. 233; In *re Wall*, 8 id. 85.

A minor's contract of enlistment is voidable, not void, and is not so voidable at the instance of the minor. If, after enlistment, he commits an offense, is actually arrested, and in course of trial before the contract is duly avoided, he may be tried and punished. In *re Wall* (C. C. 1881), 8 Fed. 85; see also *Barrett v. Hopkins*, 7 id. 812.

A father sought the release of his son under 18 years of age, who had enlisted without the father's consent. The court held that the acceptance by the father of an allotment of \$15 per month out of the son's pay and of a Government allowance of \$10 a month was a clear ratification of the son's enlistment in the Army. In *re O'Dell*, U. S. District Court, W. D. South Carolina, Apr. 25, 1918; In *re Smith*, U. S. District Court, W. D. South Carolina, Apr. 25, 1918.

See also notes to 2785, post.

Application of section.—The section applies to an enlistment in the National Guard called into the service of the United States, as well as to an enlistment in the Regular Army. *Hoskins v. Dickerson* (C. C. A. 1917), 239 Fed. 275.

In the absence of any statutory authority enabling a mother to annul an enlistment in the National Guard of the District of

Columbia, because of her son's misrepresentation as to his age, she is not entitled to secure his release when, by reason of said enlistment, he is temporarily drafted into the service of the United States. *Ex parte Winfield* (D. C. 1916), 236 Fed. 552.

Minor without parent or guardian.—It has been held that a minor who has no parent, guardian, or master could not be enlisted at all, but that such an enlistment was perhaps not absolutely void, but only voidable at the infant's election. *Commonwealth v. Cushing* (1814), 11 Mass. 67, 6 Am. Dec. 156. And see (1851) 5 Op. Atty. Gen. 313.

Paroled prisoner of war.—A prisoner of war, paroled by the enemy, although a minor illegally enlisted, is not entitled to his discharge until after his exchange. *U. S. v. Wright* (C. C. 1863), Fed. Cas. No. 16,777.

Who are parents or guardians.—The word "parents" includes the mother when the father is dead and there is no guardian. *Shorner's Case* (D. C. 1812), Fed. Cas. No. 12,808; *Ex parte Cook* (N. Y. 1856), 17 How. Prac. 337; *Ex parte Mason* (1809), 5 N. C. (1 Murph.), 336; *Commonwealth v. Callan*, 6 Bin. (Pa. 1814), 255.

A court can not discharge from the service a minor whose parents are nonresident aliens, and who at the time of enlistment had no guardian, on the application of a guardian since appointed. *In re Perrone* (D. C. 1898), 89 Fed. 150.

Where the mother of a minor, by articles of agreement, gave to others full control, care, and custody and complete management of him when he was two years and four months of age until he should arrive at majority, such others agreeing to take and raise the child in all respects as their own, and to give it suitable support and education, and the minor having enlisted in the United States Army at the age of 18 years and 7 months without the consent of his natural mother or of such others, they were entitled to maintain habeas corpus proceedings for the minor's discharge, having during the pendency of the proceedings adopted him. *Doane v. Burkman* (1911), 190 Fed. 541, 111 C. C. A. 373.

A minor, whose enlistment in the Army was invalid, should be released on the application of a person claiming the minor as an apprentice. *Commonwealth v. Harrison* (1814), 11 Mass. 63; *State v. Brearly* (1819), 5 N. J. Law (2 Southard) 639. See also, *Commonwealth v. Barker* (Pa. 1813), 5 Bin. 423, where the managers of an almshouse had apprenticed the minor to a mechanic, the consent of the managers held not necessary.

The Secretary of War was not under obligation by law to discharge minors from the Army on the application of alleged parents or guardians not domiciled in the United States. (1854) 6 Op. Atty. Gen. 607.

What constitutes consent of parent or guardian.—The consent to the enlistment is sufficient if it be given after the enlistment. *State v. Brearly*, (1819), 5 N. J. Law (2 Southard) 555; *Commonwealth v. Camac* (Pa. 1814), 1 Serg. & R. 87. Although the consent to the enlistment of a minor is required to be in writing, yet where the consent was by parol on the day of enlistment, and the written consent made several days thereafter, it is sufficient. *Ex parte Cook* (N. Y. 1856), 17 How. Prac. 337. And see *In re Kenniston* (Mass. 1847), 9 Law Rep. 548.

Where a mother, the sole surviving parent of a minor, on learning of her son's enlistment, shortly thereafter, did nothing to repudiate the same, or to secure his release, and testified that she would have been reconciled to it, had he remained in the Army and not deserted, but that after his desertion she wanted to keep him out of the Army, her acts constituted an implied consent to his enlistment. *Ex parte Dunakin* (D. C. 1913), 202 Fed. 290.

Effect of relation of master and apprentice.—Since the Government has the right to require the service of its citizens, minors as well as adults, for the public defense, it may dissolve the relation of master and apprentice existing either by force of municipal regulation, or under indentures executed under, or sanctioned by, local laws. *Johnson v. Dodd* (1874), 56 N. Y. 76.

Effect of oath of enlistment.—Sec. 2, act of Feb. 13, 1862 (12 Stat. 339), contained a provision that the oath of a minor enlisting in the Army should be conclusive. Under this act it has been held: That the oath was conclusive. *U. S. v. Taylor* (D. C. 1863), Fed. Cas. No. 16,439; *In re Conley* (D. C. 1866), Fed. Cas. No. 3,102; *In re Cline* (D. C. 1867), Fed. Cas. No. 2,896; *In re Riley* (D. C. 1867), Fed. Cas. No. 11,834; (1873), 14 Op. Atty. Gen. 210; *Ex parte Rielly* (N. Y. 1867), 2 Abb. Prac. (N. S.) 334. That it was only between the Government and the recruit, and that it could not estop the master or the parent setting up a claim to the person, and a right to the services of the minor. *Wantlan v. White* (1862), 19 Ind. 470; *In re Bewick* (N. Y. 1863), 25 How. Prac. 149. And it has also been held that the ordinary enlistment oath, containing no statement of the age of the re-

craft, was not conclusive that he is over the age of 18 years, nor was an unsworn statement of such recruit. In *re Tarble* (1870), 25 Wis. 390, 3 Am. Rep. 85. And further that the provision applied to a case where the recruit falsely represented himself to be 18 years of age, and not where the officer who enlisted him was informed by him at the time that he was under such age, or knew such to be the fact; and such an enlistment was unauthorized, and a fraud on the parent and Government. In *re Higgins* (1863), 16 Wis. 351. And see *U. S. v. Wright* (C. C. 1862), Fed. Cas. No. 16,778, holding that the oath was not conclusive upon the courts, but was a protection to the enlisting officer.

In executing the provisions of sec. 20, act of Feb. 24, 1864, and sec. 5, act of July 4, 1864, the Secretary of War was not concluded by the oath of enlistment on the question of age. (1873) 14 Op. Atty. Gen. 210.

As to legality of enlistment of minor without the oath of enlistment, see in *re McDonald* (D. C. 1866), Fed. Cas. No. 8,752.

Ratification of enlistment.—Where a minor, having enlisted without the consent of his father, remained in the service more than a year after he became of age, receiving his pay and rations, without any dissent, and without any reasonable excuse for not making an application for a discharge, his acts amounted to a ratification of the enlistment. *State v. Dimick* (1841), 12 N. H. 194, 37 Am. Dec. 197.

Any defect of enlistment in the National Guard of one under 18 years of age, because without the consent of his parent, becomes of no effect and not available to the father to secure the minor's discharge where not urged, although known, till after he was 18 and drafted into the service of the United States under the national defense act of June 3, 1916. *Reed v. Cushman* (1918), 251 Fed. 872.

One who enlisted in the National Guard, was accepted, took the prescribed oath, and later took the Federal enlistment oath prescribed by the national defense act, and received pay and clothing over a long period from the State and Federal Governments, is a soldier, subject to military jurisdiction in respect of any offense committed against military law, though under 21 when enlisted, an alien who had not declared his intention, and enlisted without the consent of his parent or guardian, and had a dependent mother. *Ex parte Dostal* (D. C. 1917), 243 Fed. 664.

Right to discharge as affected by pending prosecution for violation of military law.—

Habeas corpus will not lie to discharge a minor under 18 years of age enlisted in the military service without the consent of his parents or guardian, where the minor is under arrest and held for trial by court-martial on a charge cognizable by a military or naval court. *Dillingham v. Booker* (1908), 163 Fed. 696, 90 C. C. A. 280, 18 L. R. A. (N. S.), 956, 16 Ann. Cas. 127. Nor while undergoing a sentence imposed on him by a court-martial for a violation of the Articles of War. In *re Dowd* (D. C. 1898), 90 Fed. 718. [C. S. p. 3716].

But where the minor has merely been confined and not notified of any charges against him, and in fact none have been preferred, there have been no such military proceedings as to deprive the civil courts of jurisdiction, on writ of habeas corpus. *Ex parte Avery* (D. C. 1916), 235 Fed. 248.

A military tribunal has jurisdiction to try offender under military age for offenses committed before his father's election to terminate his enlistment, though he was not taken into custody until after such election. *U. S. v. Brown* (D. C. 1917), 242 Fed. 983; *Ex parte Foley* (D. C. 1917), 243 Fed. 470.

On habeas corpus an enlisted minor was remanded to custody of military authorities for trial for alleged offenses and service of any sentence imposed, but thereafter to be released from such custody. *Id.*

Where an enlisted minor is charged with mutiny before the contract is avoided, and is placed in the custody of a court-martial, and the jurisdiction of that court has attached, it is not competent for the State court, by a writ of habeas corpus, to withdraw the party therefrom. In *re Dew* (Mass. 1862), 25 Law Rep. 538.

Right to discharge as affected by pending prosecution for fraudulent enlistment.—Under 404, ante, and this section minor arrested for fraudulently enlisting in violation of sixty-second article of war after service of writ of habeas corpus sued out by his mother, will not be taken from the custody of the military authorities. *U. S. v. Williford* (1915), 220 Fed. 291, 136 C. C. A. 273.

A minor, who by misrepresenting his age, has fraudulently enlisted in the Army without the consent of his parents, and thereby subjected himself to punishment under military law, will not be relieved from such punishment by habeas corpus on the application of his parents, though the military prosecution is not instituted until after the writ was issued. In *re Lessard* (C. C. 1905), 184 Fed. 305; *Ex parte Lewkowits* (C. C. 1908), 163 Fed. 646. *Contra*, see *Ex parte Houghton* (C. C. 1904), 129

Fed. 239; *In re Carver* (C. C. 1900), 103 Fed. 624.

Rights as affected by desertion.—A minor who enlists in the Army without the consent of his parents or guardians, and subsequently deserts, is amenable to a court-martial as a deserter, and the findings of such court-martial can not be reviewed by the civil courts. Nor is he entitled to discharge from arrest for such offense on habeas corpus. *In re Wall* (C. C. 1881), 8 Fed. 85. [C. S. p. 3717.] At least until he has been discharged from such custody or has served the sentence imposed on him by the military tribunal. *In re Cosenow* (C. C. 1889), 37 Fed. 668, 669. [C. S. p. 3717.]

The fact that a minor deserted and concealed himself for over five years and until after he had arrived at majority does not relieve him from his obligation as a soldier, or his liability to military control. *Morrissey v. Perry* (1890), 11 Sup. Ct. 57, 137 U. S. 157, 34 L. Ed. 644.

Authority and jurisdiction to discharge.—By sec. 5, act of Sept. 28, 1850 (9 Stat. 507), sec. 20, act of Feb. 24, 1864 (13 Stat. 10), and sec. 5, act of July 4, 1864 (13 Stat. 380), the Secretary of War was given power to discharge minors illegally enlisted. Under these acts it has been held that the whole power of discharging minors from the Army was given to the Secretary of War, and cognizance of such matters was taken from the courts. *In re Riley* (D. C. 1867), Fed. Cas. No. 11,834. [C. S. p. 3717.]

In re McDonald (D. C. 1866), Fed. Cas. No. 8,752, it was held that the Federal courts had jurisdiction. In the following cases it has been held that State courts have no jurisdiction on habeas corpus to inquire into the detention by the United States as a soldier of a minor who had enlisted in the Army without the consent of his parents or guardian: *In re Tarble* (1871), 80 U. S. (13 Wall.) 397, 20 L. Ed. 597, reversing *In re Tarble* (1870), 25 Wis. 390, 3 Am. Rep. 85; *In re Sprangler* (1863), 11 Mich. 298; *State v. Dimick* (1841), 12 N. H. 194, 37 Am. Dec. 197. And see *In re Ferguson* (N. Y. 1812), 9 Johns. 239.

In the following cases it has been held that State courts had such jurisdiction: *Pownall v. Cushing* (Mass. 1714), 5 Dane, Abr. 593; *Commonwealth v. Harrison* (1814), 11 Mass. 63; *Commonwealth v. Cushing* (1814), 11 Mass. 37, 6 Am. Dec. 156; *Ex parte Kimball* (Mass. 1847), 9 Law Rep. 500; *Commonwealth v. Downes* (1836), 24 Pick. (41 Mass.) 227; *In re Kinneston* (Mass. 1847), 9 Law Rep. 548; *In re McConologue* (1871), 107 Mass. 154;

In re Dabbs (N. Y. 1861), 12 Abb. Prac. 113; *In re Shirk* (Pa. 1868), 3 Grant, Cas. 460, 5 Phila. 333; *U. S. v. Anderson* (1812), 3 Tenn. (Cooke) 43. In the following cases it has been held that the State courts had concurrent jurisdiction with the Federal courts: *In re Dobbs* (N. Y. 1861), 21 How. Prac. 68; *In re Dabbs* (N. Y. 1861), 12 Abb. Prac. 113; *Commonwealth v. Fox* (1847), 7 Pa. (7 Barr) 336.

Time of discharge.—An enlistment into the Army of the United States is a contract and if made by a minor, without the consent, in writing, of his parent, master, or guardian, he may avoid it on his arrival at full age. *State v. Dimick* (1841), 12 N. H. 194, 37 Am. Dec. 197. As to whether a person enlisting as a minor is not entitled to his discharge at the age of 21, regardless of the term of his enlistment, see *Ex parte Brown* (C. C. 1839), Fed. Cas. No. 1,972.

Hearing on application for discharge.—Where the record in a habeas corpus proceeding to procure the discharge from the Army of an enlisted soldier does not show, except by ex parte affidavit attached to the petition, that he was a minor when he enlisted or that his enlistment was without his parents' consent, and where the return of the military commandant, alleging due enlistment for an unexpired term, desertion, surrender, commitment to the commandant, and confinement under pending charges for the desertion, was not traversed, the writ was properly denied. *Moore v. U. S.* (1908), 159 Fed. 701, 86 C. C. A. 569.

Where relator, held by United States Army officers, admitted that he had enlisted in the service, but alleged that he was only 16 years of age and was drunk when he enlisted, the court will not inquire into the regularity of the enlistment on habeas corpus. *In re Robert* (Pa. 1809), 2 Hall Law J. 192.

Where the descriptive roll made out at enlistment states the recruit to have been over 21, and he has since received pay, subsistence, etc., as a properly enlisted soldier, without objection, the presumption is in favor of the regularity of the proceedings of the enlisting officer, and that such recruit was of lawful age, until he clearly establishes the contrary. And the descriptive roll made out at his enlistment, stating his age to be over 21, is important evidence of that fact. *Green v. Ewell* (1857), 1 N. M. 166.

The decision of the Supreme Judicial Court, discharging a person from an enlistment in the Army of the United States on the ground that he was a minor, is con-

clusive that he was a minor, and not subject to be held either under his enlistment or under a charge of desertion. *McConologue's Case* (1871), 107 Mass. 154.

Second application for discharge.—Where a judge of the court of common pleas, on application of the father of a minor who had enlisted in the Army without his consent, had refused to discharge such minor, as he elected to remain in the Army, it was in the discretion of the Supreme Court to entertain a second application for such

purpose. *Commonwealth v. Biddle* (Pa. 1846), *Brightly*, N. P. 447.

Return of bounty, etc.—On a habeas corpus to secure the discharge of a minor enlisted in the Army of the United States without his parents' consent, the Supreme Court has no authority, on the discharge of the minor, to compel a return of the bounty or clothing received from the United States. *Commonwealth v. Biddle* (1846), 4 Clark, 35, 6 Pa. Law J. 287; *Brightly*, N. P. 447.

2170. Fraudulent enlistment.—That fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared a military offense and made punishable by court-martial, under the sixty-second article of war. *Sec. 3, act of July 27, 1892* (27 Stat. 278).

The offense of fraudulent enlistment is denounced by A. W. 54, ch. 52, post.

2171. Complete period of enlistment.— * * * that an enlistment shall not be regarded as complete until the soldier shall have made good any time lost during an enlistment period by unauthorized absences exceeding one day, but any soldier who receives an honorable discharge for the convenience of the Government after having served more than half of his enlistment shall be considered as having served an enlistment period within the meaning of this Act; that the present enlistment period of men now in service shall be determined by the number of years continuous service they have had at the date of approval of this Act, under existing laws, counting three years to an enlistment, and the former service entitling an enlisted man to reenlisted pay under existing laws shall be counted as one enlistment period: * * * *Act of May 11, 1908* (35 Stat. 109).

* * * *Provided further*, That an enlistment shall not be regarded as complete until the soldier shall have made good any time in excess of one day lost by unauthorized absences, or on account of disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct, or while in confinement awaiting trial or disposition of his case if the trial results in conviction, or while in confinement under sentence: * * * *Act of Apr. 27, 1914* (38 Stat. 354), *making appropriations for the support of the Army*.

See also A. W. 107, ch. 52, post.

But see 1694, ante.

Notes of Decisions.

Term of enlistment.—It seems that no discretion has been conferred to contract for service in the Army, either conditionally or for a shorter term than that specified by law. (1846) 4 Op. Atty. Gen. 537.

By his engagement to enlist the soldier is bound for a specific term of service, the last day of which is as much fixed by the contract as the first. With the last day

of the term his engagement expires, and with the expiration of his engagement the obligation to serve thereby imposed is at an end. This results, notwithstanding there has been an infraction of the contract by desertion or otherwise, unless the soldier, before the term is up, consents to an extension. (1876) 15 Op. Atty. Gen. 152.

2172. Enlistment for one or three years.—Hereafter original enlistments in the Regular Army shall be for a period of one or three years at the option of the soldier, and reenlistments shall be for a period of three years. * * * *Sec. 27, act of June 3, 1916* (39 Stat. 185), *as amended by sec. 27, act of June 4, 1920* (41 Stat. 775).

The period of enlistment was fixed at five years by R. S. 1119 and continued at the same period by sec. 2, act of June 16, 1890 (26 Stat. 158); by sec. 2, act of Aug. 1, 1894 (28 Stat. 216), it was reduced to three years; by sec. 2, act of Aug. 24, 1912 (37 Stat. 590), it was provided that from Nov. 1, 1912, enlistments normally should be for a period of seven years, the first four of which were to be in active service and the last three on furlough in the Regular Army Reserve; by sec. 27, act of June 3, 1916, it was provided that from Nov. 1, 1916, while the enlistment period should continue to be seven years, the normal period of active service should be three years and the normal period in the reserve increased to four years. This last act was superseded by the above section. By sec. 31, act of June 3, 1916 (39 Stat. 187), it was provided that all enlistments in the Regular Army, including those in the Regular Army Reserve, which were in force on the date of the outbreak of war should continue in force for one year, unless sooner terminated by order of the Secretary of War, but sec. 31, act of June 4, 1920 (41 Stat. 775), struck out this section, which had been suspended during the World War by sec. 14 of the selective draft act, May 18, 1917 (40 Stat. 83). By sec. 7 of the latter act (40 Stat. 81) all voluntary enlistments were for the period of the emergency of the World War. But after the armistice of Nov. 11, 1918, the act of Feb. 28, 1919 (40 Stat. 1211), was passed, providing "That so much of sections seven and fourteen of the Act entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' approved May eighteenth, nineteen hundred and seventeen, as impose restrictions upon enlistments in the Regular Army, are hereby repealed in so far as they apply to enlistments and reenlistments in the Regular Army after the date of approval of this Act: *Provided*, That from and after the approval of this Act, one-third of the enlistments in the Regular Army of the United States shall be for a period of one year, and the remaining two-thirds thereof shall be for the period of three years. Any person enlisting under the provisions of this Act shall not be required to serve with the reserves. The pay of the men enlisted hereunder shall be the same as that provided by the Act entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' approved May 18, 1917: *Provided further*, That after the expiration of one year those enlisting for the period of three years may be discharged in the discretion of the Secretary of War under such rules and regulations as may be prescribed by him after one year of service."

2173. Vacant.

2174. Reenlistment within three months after discharge.— * * * *Provided*, That hereafter any soldier honorably discharged at the termination of his first or any succeeding enlistment period who reenlists after the expiration of three months shall be regarded as in his second enlistment; * * * *Act of May 11, 1908 (35 Stat. 109)*.

But see 1693, ante.

This section, while not specifically repealed, has become of little practical importance by reason of the fact that increase of base pay no longer depends on the period of enlistment, but, as in the case of officers, on the length of time served. See ante, 1694.

2175. Reenlistment of noncommissioned officers.— * * * *Provided further*, That any noncommissioned officer discharged with an excellent character shall be permitted, at the expiration of three years in the active service, to reenlist in the organization from which discharged with the rank and grade held by him at the time of his discharge if he reenlists within twenty days after the date of such discharge: * * * *Sec. 27, act of June 3, 1916 (39 Stat. 186)*.

2176. Reenlistment of men discharged from the Army to accept commissions.— That any enlisted man of the Army of the United States who has heretofore been, or shall hereafter be, discharged to accept a commission in any component part of the Army of the United States, and who shall tender himself for enlistment within three months after the termination of his commissioned service, shall, subject to such examination for enlistment as is provided by law or regulation, be accepted and be restored to the grade held by him before being discharged to accept such commission; and in computing service for retirement and continuous-service pay he shall be credited with all time served with the

forces of the United States, and his service shall be deemed continuous, notwithstanding the interruption thereof by the changes of status provided for herein. *Act of March 30, 1918 (40 Stat. 501).*

Act of May 12, 1917 (40 Stat. 74), making appropriations for the support of the Army provided that the "enlisted men who were discharged from the Army to accept a commission in the National Guard, or in any volunteer force that may be authorized in the future, at the call of the President, June eighteenth, nineteen hundred and sixteen, be restored to their original status upon reenlisting in the Regular Army." This refers to the Mexican punitive expedition.

2177. Reenlistment restricted if previous service has not been honorable.—

* * * no soldier shall be again enlisted in the Army whose service during his last preceding term of enlistment has not been honest and faithful; * * * *Sec. 2, act of Aug. 1, 1894 (28 Stat. 216).*

* * * *And provided further,* That the provisions of section eleven hundred and eighteen of the Revised Statutes of the United States that no deserter from the military service of the United States shall be enlisted or mustered into the military service, and the provisions of section two of the Act of Congress approved August first, eighteen hundred and ninety-four, entitled "An Act to regulate enlistments in the Army of the United States," shall not be construed to preclude the reenlistment or muster into the Army of any person who has deserted, or may hereafter desert, from the military service of the United States in time of peace, or of any soldier whose service during his last preceding term of enlistment has not been honest and faithful, whenever the reenlistment or muster into the military service of such person or soldier shall, in view of the good conduct of such person or soldier subsequent to such desertion or service, be authorized by the Secretary of War. *R. S. 1998, as amended by act of Aug. 22, 1912 (37 Stat. 356).*

Sec. 1 of the act of Aug. 1, 1894, repealed a previous provision that "no private shall be reenlisted who has served ten years or more or who is over thirty-five years of age, except such as have already served as enlisted men for twenty years or upwards," contained in act of Feb. 27, 1893 (27 Stat. 486).

A proviso annexed to R. S. 1998 as amended, which permitted any soldier, who had been prevented from reenlisting by the provision so repealed, to reenlist within 3 months from the date of approval of this act, and to receive the same pay, etc., as if he had reenlisted within 30 days from his discharge, is omitted as having been fulfilled.

Notes of Decisions.

Reenlistment.—Reenlistment under act of Feb. 27, 1893, 27 Stat. 486. See (1893) 20 Op. Atty. Gen. 684.

While the President's pardon restored one who had been convicted of desertion to his legal rights and fully relieved him of the disabilities legally attaching to his conviction, it does not destroy an existing fact that his service was not faithful and honest. And a recruiting officer has the right to reject a candidate for reenlistment in the Army whose service during his previous term was not honest and faithful,

notwithstanding the President's pardon of the offense. (1898) 22 Op. Atty. Gen. 36; contra (1908) 26 Op. Atty. Gen. 617.

A contract of reenlistment voluntarily entered into by a soldier while under lawful arrest for a military offense, through the friendly counsel of his guards, but without any request or solicitation of the enlisting officer, though upon his promise that the charge pending will be dismissed if the soldier's future conduct is good, is not invalid for duress. *McDonald v. Carlton* (1857), 1 N. M. 172.

2178. Enlisted strength to be exclusive of soldiers sentenced to dishonorable discharge.—* * * *And provided further,* That the authorized enlisted strength of the Army and of organizations thereof shall be exclusive of soldiers under sentences which include confinement and dishonorable discharge. *Act of Apr. 27, 1914 (38 Stat. 354).*

2179. Maximum enlisted strength during peace.— * * * Except in time of war or similar emergency when the public safety demands it, the number of enlisted men of the Regular Army shall not exceed two hundred and eighty thousand, including the Philippine Scouts. *Sec. 2, act of June 3, 1916 (39 Stat. 166), as amended by sec. 2, act of June 4, 1920 (41 Stat. 759).*

By a proviso of the act of Apr. 27, 1914, ante, 2178, authorized enlisted strength is exclusive of soldiers under sentences which include confinement and dishonorable discharge.

The number of enlisted men in the Army was limited to 30,000 by R. S. 1115. But the Army appropriation acts for the year ending June 30, 1875, act of June 16, 1874 (18 Stat. 72), and for several subsequent years, contained provisions that no money appropriated thereby should be paid for recruiting the Army beyond 25,000 enlisted men; act of June 23, 1879 (21 Stat. 30), further provided that there should be no more than 25,000 enlisted men in the Army at any one time, unless otherwise authorized by law; and this provision was repeated in subsequent Army appropriation acts. An increase of the enlisted men for the artillery arm was authorized by act of Mar. 8, 1898 (30 Stat. 261). An increase of the enlisted strength in time of war was authorized by act of Apr. 26, 1898 (30 Stat. 364), and a further temporary increase, to not exceeding 65,000 enlisted men, by sec. 12, act of Mar. 2, 1899 (30 Stat. 979). All these provisions were superseded by a provision of sec. 36, act of Feb. 2, 1901, ante, 2151, that the total enlisted force of the line of the Army, together with the native force of Philippine Scouts, not exceeding 12,000, should not exceed at any one time 100,000, which said provision was superseded by a provision of sec. 2, act of June 3, 1916 (39 Stat. 166), that the total enlisted strength of the line of the Army, excluding the Philippine Scouts and the enlisted men of the Quartermaster Corps, Medical Department and Signal Corps, and unassigned recruits, should not, in time of peace, exceed 175,000.

The enlistment of a corps of men as "general-service clerks" and "general-service messengers," not to be computed as part of the number to which the Army was limited, was authorized by act of July 29, 1886 (24 Stat. 167); but that act was repealed by act of Aug. 6, 1894 (28 Stat. 236).

Enlistments, in excess of the total strength authorized, of trained men for organizations serving out of the United States, were authorized by sec. 29, act of Feb. 2, 1901, 2181, post.

The total number of enlisted men in the line, as authorized by sec. 36, act of Feb. 2, 1901, ante, 2151, was not to be increased by the act to reorganize the Artillery, act of Jan. 25, 1907, by a provision of sec. 8 of that act, superseded by sec. 19, act of June 3, 1916 (39 Stat. 179), which in turn was amended by sec. 19, act of June 4, 1920, ante, 2135.

The total number of sergeants and corporals in the Coast Artillery, and the total enlisted strength of the Coast Artillery, were limited by provisions of sec. 6, act of Jan. 25, 1907 (34 Stat. 862).

The enlistment of not to exceed 6,000 men, to be attached to the Quartermaster Corps, who should not be counted as part of the enlisted force provided by law, was authorized by a provision of sec. 4, act of Aug. 24, 1912, ante, 710, which said provision, in so far as it related to said force not being counted as a part of the enlisted force, was superseded by sec. 2, act of June 3, 1916, above named.

The Hospital Corps was not to be counted as a part of the enlisted force, by a provision of the act to organize the corps, sec. 1, act of Mar. 1, 1887 (24 Stat. 435), which was superseded by secs. 2, 10 of the act of June 3, 1916, which however, excluded the Medical Department from the total enlisted strength, as above stated. Secs. 2 and 10 were stricken out by corresponding sections, act of June 4, 1920 (41 Stat. 759, 766).

The total number of enlisted men authorized for the whole Army was not to be exceeded by the increase of the enlisted force of the Corps of Engineers authorized by sec. 11, act of Feb. 2, 1901, by a provision of that section (31 Stat. 750).

The Secretary of War was directed to cease recruiting until the number of enlisted men should not exceed 175,000 by joint resolution, which became law over the veto of the President on Feb. 5, 1921 (41 Stat. 1098).

2180. Enlisted strength of the Regular Army to be maintained during recruiting for other arms.— * * * and the enlisted men now or hereafter authorized by law for other branches of the military service shall be provided and

maintained without any impairment of the enlisted strength prescribed for any of said arms. *Joint Res. 11, Mar. 17, 1916 (39 Stat. 36).*

This section was part of a "Joint Resolution providing for an increase of the enlisted men of the Army in an emergency," which superseded a part of sec. 80, act of Feb. 2, 1901 (31 Stat. 756), which read as follows: "The President is authorized to maintain the enlisted force of the several organizations of the Army at their maximum strength as fixed by this act during the present exigencies of the service or until such time as Congress may hereafter otherwise direct."

The words of said resolution omitted here were superseded by provisions of sec. 2, act of June 3, 1916, which excluded the unassigned recruits from the total enlisted strength of the Regular Army, and provided that such unassigned recruits at depots or elsewhere should at no time, except in time of war, exceed by more than 7 per cent the total authorized enlisted strength, and which was stricken out by sec. 2, act of June 4, 1920 (41 Stat. 759). The first part of this resolution may also be regarded as having been superseded by a provision of sec. 24, act of June 3, 1916 (39 Stat. 182), repealed by sec. 24, act of June 4, 1920 (41 Stat. 771).

2181. Replacement of losses of enlisted men on foreign service.—That to fill vacancies occurring from time to time in the several organizations serving without the limits of the United States with trained men the President is authorized to enlist recruits in numbers equal to four per centum in excess of the total strength authorized for such organizations. *Sec. 29, act of Feb. 2, 1901 (31 Stat. 756).*

But see 2179, ante.

2182. Industrial furloughs.—That, whenever during the continuance of the present war in the opinion of the Secretary of War the interests of the service or the national security and defense render it necessary or desirable, the Secretary of War be, and he hereby is, authorized to grant furloughs to enlisted men of the Army of the United States with or without pay and allowances or with partial pay and allowances and, for such periods as he may designate, to permit said enlisted men to engage in civil occupations and pursuits: *Provided*, That such furloughs shall be granted only upon the voluntary application of such enlisted men under regulations to be prescribed by the Secretary of War. *Act of Mar. 16, 1918 (40 Stat. 450).*

The above is emergency legislation and no longer operative.

2183. Transfer from the military to the naval service.—Any person enlisted in the military service of the United States may, on application to the Navy Department, approved by the President, be transferred to the Navy or Marine Corps, to serve therein the residue of his term of enlistment, subject to the laws and regulations for the government of the Navy. But such transfer shall not release him from any indebtedness to the Government, nor, without the consent of the President, from any penalty incurred for a breach of military law. *R. S. 1421.*

See paragraphs 114, 115, Army Regulations, 1913.

2184. Corporal bugler and bugler, first class.—That there are hereby created in the Army the grades of corporal bugler, and bugler, first class; and hereafter for each battalion and squadron headquarters of units in which the grade of bugler is now authorized, there shall be one corporal bugler, and for each company, battery, troop, or organization in which the grade of bugler is now authorized there shall be one bugler, first class. *Chap. XX, act of July 9, 1918 (40 Stat. 893).*

But see 1671, ante.

2185. Cooks.—That the Secretary of War be, and he is hereby, authorized and directed to cause to be enlisted in each company, battery, and troop in the Regular and Volunteer armies of the United States, as a part of the authorized enlisted strength thereof, under rules to be prescribed by him, a competent person as cook, who shall take rank as and be allowed the pay of a corporal of the arm of the service to which he belongs, and whose duties in connection with the preparation and serving of the food of the enlisted men of the company, battery, or troop, and with the supervision and instruction of enlisted men hereby authorized to be detailed to assist him, shall be prescribed in the regulations for the government of the Army. *Act of July 7, 1898 (30 Stat. 721).*

But see 1671, ante.

Section 1283, Revised Statutes, which required cooks to be detailed, in turn, from the privates of each company was repealed by the act of June 29, 1879 (20 Stat. 276). The act of July 7, 1898 (30 Stat. 721), authorized the enlistment of one cook in each company in the Military Establishment. Such cook was to have the rank and receive the pay of a corporal. This statute was replaced by the act of Mar. 2, 1899 (30 Stat. 977), which authorized two cooks to be enlisted in each troop of Cavalry, battery of Artillery, and company of Infantry of the Regular and Volunteer Establishments. By section 9 of the act of Mar. 2, 1899, the cooks so enlisted were to have the pay of sergeants of Infantry.

By sec. 9, act of Mar. 2, 1899, ante 1678, cooks were given the pay and allowances of sergeants of Infantry. Further provisions for cooks in the various arms were found in secs. 17-20, act of June 3, 1916 (39 Stat. 177-180), now repealed.

2186. Details of working parties to be in writing.—Working parties of soldiers shall be detailed for employment as artificers or laborers, in the construction of permanent military works or public roads, or in other constant labor only upon the written order of a commanding officer, when such detail is for ten or more days. *R. S. 1235.*

But see 1679, ante.

Notes of Decisions.

Construction of section in general.—This section is intended to prevent doubts and surmises. The fact that an order detailing an enlisted man for recruiting duty is in writing can not be considered a detail detaching him for employment as a clerk. *Phillips v. U. S. (1912), 47 Ct. Cl. 288.*

This section was not intended to preclude a recovery of extra-duty pay, where there had been a detail to extra duty by competent authority, although not in writing,

and extra duty entitling the enlisted man to extra pay under the statute had actually been performed. *U. S. v. Ross (1915), 36 Sup. Ct. 198, 199, 239 U. S. 550, 60 L. Ed. 422.*

This section does not apply to the guards on duty at military prisons, where the whole company to which the soldier belongs is engaged on such duty. *Schwanz v. U. S. (1915), 56 Ct. Cl. 276.*

2187. Detail for road construction.—That no officer or enlisted man of the Army, Navy, or Marine Corps shall be detailed for work on the roads which come within the provisions of this Act except by his own consent: *And provided further*, That the Secretary of Agriculture through the War Department shall ascertain the number of days any such soldiers, sailors, and marines have worked on the public roads in the several States (other than roads within the limits of cantonments or military reservations in the several States) during the existing war and also the location where they worked and their names and rank, and report to Congress at the beginning of its next regular session: *Provided further*, That when any officer or enlisted man in the Army, the Navy, or the Marine Corps shall have been or may be in the future detailed for labor in the building of roads or other highway construction or repair work (other than roads within the limits of cantonments or military

reservations in the several States), during the existing war, the pay of such officer or enlisted man shall be equalized to conform to the compensation paid to civilian employees in the same or like employment and the amount found to be due such officers, soldiers, sailors, and marines, less the amount of his pay as such officer, soldier, sailor, or marine, shall be paid to him from the 1920 appropriation herein allotted to the States wherein such highway construction or repair work was or will be performed. *Sec. 9, act of Feb. 28, 1919 (40 Stat. 1202).*

But see 2353, post.

2188. Detail to special service from forces in the field.—Details to special service from forces in the field shall be made only with the consent of the commanding officer of the forces. *R. S. 1236.*

The enlistment of a corps of men for clerical service and messenger duty at headquarters of the Army and at other headquarters, at recruiting depots, and at West Point, not to be assigned to any other duty, was authorized by act of July 29, 1886 (24 Stat. 167); but that act was repealed by act of Aug. 6, 1894 (28 Stat. 236).

Notes of Decisions.

<p>Detail not a furlough.—An order which relieves a soldier from duty in his company, but requires him to immediately report for duty in another branch of the military service, is not a furlough (though</p>	<p>it be so styled in the order), but is essentially a detail for other duty, and must be treated as such. (1877) 15 Op. Atty. Gen. 362.</p>
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2189. Recruiting duty.—That the Secretary of War is authorized to detach from the Army at large such number of enlisted men as may be necessary to perform duty at the various recruiting stations, and while performing such duty one member of each party shall have the rank, pay, and allowances of sergeant and one the rank, pay, and allowances of corporal of the arm of the service to which they respectively belong. *Sec. 31, act of Feb. 2, 1901 (31 Stat. 756).*

But see 2995, post.

Notes of Decisions.

<p>Extra pay.—An enlisted man detailed on recruiting duty is not entitled to extra pay. <i>Phillips v. U. S. (1912), 47 Ct. Cl. 288.</i></p>	
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2190. First sergeant at a recruiting station.—That section twenty-two of said Act be, and is hereby, amended by striking out the period at the end thereof, substituting therefor a colon, and adding thereto the following: *Provided*, That one of the enlisted men at each main recruiting station who has been detached for duty at such station under the provisions of the Act of Congress approved February second, nineteen hundred and one, may, in the discretion of the Secretary of War, have the rank, pay, and allowances of a first sergeant of Infantry. *Sec. 2, chap. XVII, act of July 9, 1918 (40 Stat. 889), amending sec. 22, act of June 3, 1916 (39 Stat. 181).*

But see 2995, post.

2191. Temporary noncommissioned officers at recruit depots.— * * * *Provided*, That hereafter the Secretary of War may authorize the temporary appointment of such number of sergeants and corporals in the companies at the general recruiting depots as may be necessary for the proper control and in-

struction of the varying number of recruits attached to such companies;
 * * * *Act of Mar. 3, 1909 (35 Stat. 741), making appropriations for the support of the Army.*

But see 2995, post.

2192. Sergeant major at a recruit depot.— * * * *Provided*, That hereafter one of the enlisted men detached from the Army at large for duty at each of the recruit depots under the provisions of the Act of June twelfth, nineteen hundred and six, shall, while so detached, have the rank, pay, and allowances of a regimental sergeant major. *Act of Aug. 29, 1916 (39 Stat. 624), making appropriations for the support of the Army.*

But see 2995, post.

Act of June 12, 1906, mentioned in this section, is set forth 2140, ante.

2193. Instructors of rifle clubs.—*Provided*, That the Secretary of War, in his discretion, and under such regulations as he may prescribe, may authorize the detail of enlisted men of the Army as temporary instructors in rifle practice to organized rifle clubs requesting such instruction. *Act of May 12, 1917 (40 Stat. 64).*

2194. Duty at educational institutions during the World War.—That during the present war the President be, and he hereby is, authorized to detail for duty at institutions where one or more units of the Reserve Officers' Training Corps are maintained such number of enlisted men, either active or retired, of the Army of the United States as he may deem necessary, but the active non-commissioned officers so detailed shall have had at least one year's active service, and the total number of such active noncommissioned officers so detailed shall not exceed three thousand, and shall be additional in their respective grades to those otherwise authorized for the Army of the United States. While detailed under the provisions of this section retired noncommissioned officers of the Army of the United States shall receive active pay and allowances. *Sec. 3, act of April 17, 1918 (40 Stat. 532).*

The above is emergency legislation and no longer operative.

2195. Stenographic reporters.— * * * *Provided*, That hereafter enlisted men may be detailed to serve as stenographic reporters for general courts-martial, courts of inquiry, military commissions, and retiring boards, and while so serving shall receive extra pay at the rate of not exceeding five cents for each one hundred words taken in shorthand and transcribed, such extra pay to be met from the annual appropriation for expenses of courts-martial, and so forth. * * * *Act of Aug. 24, 1912 (37 Stat. 575).*

2196. Servants of officers.—No officer shall use an enlisted man as a servant in any case whatever. *R. S. 1232.*

2197. Civil employment.—Hereafter no enlisted man in the active service of the United States in the Army, Navy, and Marine Corps, respectively, whether a noncommissioned officer, musician, or private, shall be detailed, ordered, or permitted to leave his post to engage in any pursuit, business, or performance in civil life, for emolument, hire, or otherwise, when the same shall interfere with the customary employment and regular engagement of local civilians in the respective arts, trades, or professions. *Sec. 35, act of June 3, 1916 (39 Stat. 188).*

The act of May 11, 1908 (35 Stat. 110), provided that Army bands or members thereof should not receive remuneration for furnishing music outside the limits of military posts

when the furnishing of such music placed them in competition with local civilian musicians.

Concerning the entrance of discharged soldiers into the civil service of the Government see, ante, 22-26.

2198. Regular Army Reserve abolished.—The Regular Army Reserve is hereby abolished, and all members thereof shall be discharged from the obligations under which they are now serving. *Sec. 30, act of June 3, 1916 (39 Stat. 187), as amended by sec. 30, act of June 4, 1920 (41 Stat. 775).*

Authority for the establishment of the Army Reserve was contained in sec. 2, Army appropriation act of Aug. 24, 1912 (37 Stat. 590), the provisions of which became effective Nov. 1, 1912. The authorized reserve was to consist of (1) soldiers furloughed to the reserve for the unexpired portions of seven-year terms of enlistment, either after four years' service with an organization of which they formed a part or, upon their application, after three years' service with an organization; and (2) those who enlisted or reenlisted in the reserve after having been honorably discharged from the Regular Army.

Various provisions of the act of June 3, 1916 (39 Stat. 166), found in secs. 27, 30, 31 (as amended by sec. 6, ch. XVII, act of July 9, 1918, 40 Stat. 890) and 32, were designed to enable the War Department to keep in closer touch with the reservists by providing for their field training with pay and allowances, transportation and subsistence, authorizing pay at the rate of \$2 per month at other times, and providing for the discharge of those physically unfit.

By the act of Aug. 24, 1912, above cited, the President was authorized, in the event of actual or threatened hostilities to summon all furloughed soldiers belonging to the Army Reserve to rejoin their respective organizations; by sec. 31, act of June 3, 1916, he was authorized to assign members of the Regular Army Reserve as reserves to Regular Army organizations or to organize the Reserve, or any part thereof, into units or detachments of any arm, corps, or department as he might prescribe.

For present Enlisted Reserve Corps, see 2473-2476, post.

2199. Discharge by purchase.—That in time of peace the President may, in his discretion and under such rules and upon such conditions as he shall prescribe, permit any enlisted man to purchase his discharge from the Army. The purchase money to be paid under this section shall be paid to a paymaster of the Army and be deposited to the credit of one or more of the current appropriations for the support of the Army, to be indicated by the Secretary of War, and be available for the payment of expenses incurred during the fiscal year in which the discharge is made. *Sec. 4, act of June 16, 1890 (26 Stat. 158).*

Regulations made by the President under the above section are found in par. 48, Compilation of General Orders, etc., War Dept., 1881-1915.

2200. Discharge on account of dependent relatives.—When by reason of death or disability of a member of the family of an enlisted man, occurring after his enlistment, members of his family become dependent upon him for care or support, he may, in the discretion of the Secretary of War, be discharged from the service of the United States. *Sec. 29, act of June 3, 1916 (39 Stat. 187), as amended by sec. 29, act of June 4, 1920 (41 Stat. 775).*

The section amended was similar except that it was limited in its application to cases where support was necessary and provided for the alternative of furlough to the Regular Army Reserve (now abolished, ante 2198). A provision of sec. 30, act of Feb. 2, 1901 (31 Stat. 756), had permitted discharge after one year's service where one parent had died and the other was solely dependent upon the soldier for support.

2201. Discharge on account of dependents during the World War.— * * * The President may provide for the discharge of any or all enlisted men whose status with respect to dependents renders such discharge advisable; * * * *Sec. 7, act of May 18, 1917 (40 Stat. 81).*

The above is emergency legislation and no longer operative.

2202. Discharge of temporary forces for the World War.— * * * *Provided further*, That all persons who have enlisted since April first, nineteen hundred and seventeen, either in the Regular Army or in the National Guard, and all persons who have enlisted in the National Guard since June third, nineteen hundred and sixteen, upon their application, shall be discharged upon the termination of the existing emergency. * * * *Sec. 7, act of May 18, 1917 (40 Stat. 81).*

The above is emergency legislation and no longer operative.

2203. Discharge of veterans intending to reenlist.— * * * The Secretary of War is authorized to discharge any or all of these men enlisted prior to April 2, 1917, who desire discharge from their old enlistment for the purpose of so reenlisting, regardless of whether or not the period of their original contract or enlistment has been completed: * * * *Joint Res. 14, Sept. 29, 1919 (41 Stat. 291).*

The above is emergency legislation and no longer operative.

2204. Issue of certificate of discharge under true name.—That the Secretary of War and the Secretary of the Navy be, and they are hereby, authorized and required to issue certificates of discharge or orders of acceptance of resignation, upon application and proof of identity, in the true name of such persons as enlisted or served under assumed names, while minors or otherwise, in the Army or Navy during any war between the United States and any other nation or people and were honorably discharged therefrom. Applications for said certificates of discharge or amended orders of resignation may be made by or on behalf of persons entitled to them, but no such certificate or order shall be issued where a name was assumed to cover a crime or to avoid its consequence. *Act of Aug. 22, 1912 (37 Stat. 324).*

Similar provisions for relief of soldiers and sailors who enlisted or served under assumed names during the war of the Rebellion were made by act of Apr. 14, 1890, amended by act of June 25, 1910 (26 Stat. 55; 36 Stat. 824).

2205. Lost certificate of discharge replaced.—That whenever satisfactory proof shall be furnished to the War Department that any officer or enlisted man who has been or shall hereafter be honorably discharged from the military service of the United States has lost his certificate of discharge, or the same has been destroyed without his privity or procurement, the Secretary of War shall be authorized to furnish to such officer or enlisted man, or to the widow of such officer or enlisted man, a certificate of such discharge, to be indelibly marked, so that it may be known as a certificate in lieu of a lost or destroyed discharge: *Provided*, That such certificate shall not be accepted as a voucher for the payment of any claim against the United States for pay, bounty, or other allowance, or as evidence in any other case. *Act of July 1, 1902 (32 Stat. 629).*

2206. Forging, etc., certificate of discharge.—Whoever shall forge, counterfeit, or falsely alter any certificate of discharge from the military or naval service of the United States, or shall in any manner aid or assist in forging, counterfeiting, or falsely altering any such certificate, or shall use, unlawfully have in his possession, exhibit, or cause to be used or exhibited, any such forged, counterfeited, or falsely altered certificate, knowing the same to be forged, counterfeited, or falsely altered, shall be fined not more than \$1,000 or imprisoned not more than one year, or both, in the discretion of the court. *Act of Mar. 4, 1917 (39 Stat. 1182).*

2207. Computation of foreign service toward retirement.— * * * That in computing length of service for retirement credit for double time for foreign service shall not be given to those who hereafter enlist: *And provided further*, That nothing in this provision shall be so construed as to forfeit credit for double time already accrued. *Act of Aug. 24, 1912 (37 Stat. 575).*

Provision for retirement after 30 years of service is made by act of Mar. 2, 1907 (31 Stat. 1217), ante, 1705.

Former acts provided that foreign service should be computed as double time as follows: * * * *Provided*, That hereafter in computing length of service for retirement, credit shall be given the soldier for double the time of his actual service in Porto Rico, Cuba, or in the Philippine Islands." *Act of May 26, 1900 (31 Stat. 200).*

"Hereafter, in computing the length of service for retirement, credit shall be given soldiers for double the time of their actual service in China, the same as is now given in Porto Rico, Cuba, and the Philippine Islands." *Act of Mar. 2, 1903 (32 Stat. 933).*

* * * *Provided*, That hereafter in computing the length of service for retirement, credit shall be given soldiers for double the time of their actual service in China, Cuba, the Philippine Islands, the Island of Guam, Alaska, and Panama; but double credit shall not be given for service hereafter rendered in Porto Rico or the Territory of Hawaii." *Act of Apr. 23, 1904 (33 Stat. 264).*

2208. Employment of retired soldiers on active duty.— * * * The President * * * and he may also authorize the employment on any active duty of retired enlisted men of the Regular Army, either with their rank on the retired list or in higher enlisted grades, and such retired enlisted men shall receive the full pay and allowances of the grades in which they are actively employed. *Sec. 7, Act of May 18, 1917 (40 Stat. 81).*

Notes of Decisions.

Status of retired enlisted men.—Enlisted men, after retirement, are not a part of the Army. *U. S. v. Union Pac. R. Co. (1919), 240 U. S. 854; Murphy v. U. S. (1903), 38 Ct. Cl. 511; Id. (1944), 39 Ct. Cl. 178.*

2209. Enticing, persuading, or aiding to desert.—Whoever shall entice or procure, or attempt or endeavor to entice or procure, any soldier in the military service, or any seaman or other person in the naval service of the United States, or who has been recruited for such service, to desert therefrom, or shall aid any such soldier, seaman, or other person in deserting or in attempting to desert from such service; or whoever shall harbor, conceal, protect, or assist any such soldier, seaman, or other person who may have deserted from such service, knowing him to have deserted therefrom, or shall refuse to give up and deliver such soldier, seaman, or other person on the demand of any officer authorized to receive him, shall be imprisoned not more than three years and fined not more than two thousand dollars. *Sec. 42, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1097).*

Notes of Decisions.

Application of statute to crime of soldier.—This section merely provides for the punishment of civilians, not subject to the Articles of War, who are accessories to the crime of desertion by a soldier, or who do any of the acts specified, tending to promote his commission of that crime, and has no application to the crime of the soldier himself. *Kurtz v. Moffitt (1885), 6 Sup. Ct. 148, 153, 115 U. S. 487, 20 L. Ed. 458.*

Evidence.—A conviction for having procured or enticed a person to desert (sec. 17, act 1812) is sustained by evidence of the making of representations as to the means and facilities for deserting to induce a person to enlist, with the belief that they were likely to cause him to desert, if they had such effect. *U. S. v. Clark (D. C. 1862), Fed. Cas. No. 14,808.*

"Harboring," etc., deserter.—An attorney employed by the father of a soldier alleged

to be 16 years of age, to secure said soldier's release from service because of enlistment without the father's consent, who merely advised the soldier, who was then a deserter, to remain away from the authorities until notified, held not to have "harbored, con-

cealed or assisted" the deserter within the meaning of this section, which requires some positive physical act, done with knowledge and intent to aid in the wrongful purpose of the deserter. *Firpo v. U. S. (C. C. A. 1919), 261 Fed. 850.*

2210. Arrest of deserters by civil officials.—That United States marshals and their deputies, sheriffs and their deputies, constables, and police officers of towns and cities are hereby authorized to apprehend, arrest, and receive the surrender of any deserter from the Army for the purpose of delivering him to any person in the military service authorized to receive him. *Sec. 3, act of June 16, 1890 (26 Stat. 158).*

That it shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, or District, to arrest offenders, to summarily arrest a deserter from the military service of the United States and deliver him into the custody of the military authority of the General Government. *Sec. 6, act of June 18, 1898 (30 Stat. 484).*

Notes of Decisions.

Arrest under prior laws.—See *Kurtz v. Moffitt* (1885), 6 Sup. Ct. 148, 115 U. S. 487, 29 L. Ed. 458; *U. S. v. Gleason* (C. C. 1864), Fed. Cas. No. 15,215; *Id.* (C. C. 1867), Fed. Cas. No. 15,216; *Clark v. Cumins* (1868), 47 Ill. 372; *Hutchings v. Van Bokkeleu* (1862), 34 Me. 126; *Hickey v. Huse* (1869), 56 Me. 493; *Trask v. Payne* (N. Y. 1865), 43 Barb. 569; *Hawley v. Butler* (N. Y. 1866), 48 Barb. 101; *Hawley v. Butler* (N. Y. 1868), 54 Barb. 400.

Purpose of section.—Congress, by giving permission to civil officers to make arrests of deserters, did not intend to take away the authority then existing to make such arrests on the part of the officers of the Army, but the act was intended to enable civil authorities to aid and assist the military in apprehending deserters. *In re Fair* (C. C. 1900), 100 Fed. 149.

Shooting in attempting to arrest deserter.—See *In re Matthews* (D. C. 1902), 122 Fed. 248. See also notes to A. W. 92, ch. 52, post.

2211. Reimbursement for expense of apprehending a deserter.— * * * for the apprehension, securing, and delivering of deserters, including escaped military prisoners, and the expenses incident to their pursuit, and no greater sum than \$50 for each deserter or escaped military prisoner shall, in the discretion of the Secretary of War, be paid to any civil officer or citizen for such services and expenses; * * * *Act of June 5, 1920 (41 Stat. 959), making appropriations for the support of the Army: Quartermaster Corps, Incidental expenses.*

Similar provision appears in previous appropriation acts.

2212. Pension forfeited for desertion.—That any soldier who deserts shall, besides incurring the penalties now attaching to the crime of desertion, forfeit all right to pension which he might otherwise have acquired. *Sec. 6, act of Apr. 26, 1898 (30 Stat. 365), as amended by act of May 11, 1908 (35 Stat. 110).*

The section, as originally enacted, contained provisions for an increase in time of war of the pay of enlisted men, of 20 per cent, to which the provision set forth here was annexed as a proviso. Said provisions were omitted, by amendment of the section to read as set forth here, as cited above.

Desertion as a military offense is punished under A. W. 58, ch. 52, post.

2213. Citizenship forfeited for desertion.—That every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the

military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six of the Revised Statutes of the United States: *Provided*, That the provisions of this section and said section nineteen hundred and ninety-six shall not apply to any person hereafter deserting the military or naval service of the United States in time of peace: *And provided further*, That the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests: * * * *R. S. 1998, as amended by act of Aug. 22, 1912 (37 Stat. 356).*

Sec. 1996, R. S., reads as follows:

"All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost-marshal within sixty days after the issuance of the proclamation by the President, dated the 11th day of March, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof."

Provision for removing charges of desertion against veterans of the Mexican War and the Civil War was made by R. S. 1997 and by acts of Mar. 2, 1889, and Mar. 2, 1895.

Desertion as a military offense is punished under A. W. 58, ch. 52, post.

Notes of Decisions.

Construction.—Act of Mar. 31, 1865, imposing forfeiture of citizenship as an additional penalty for desertion, is penal in its nature, and must receive a strict construction in favor of the citizen. *Huber v. Rely* (1866), 53 Pa. St. (3 P. F. Smith) 112.

Necessity of conviction.—The provisions of this section, imposing the additional penalties of forfeiture of citizenship and disqualification to hold office, can only take effect on conviction by court-martial. *Kurts v. Moffitt* (1885), 6 Sup. Ct. 148, 153, 115 U. S. 487, 29 L. Ed. 458; *State v. Symonds* (1869), 57 Me. 148; *Holt v. Holt* (1871), 59 Me. 464; *Severance v. Healey* (1870), 50 N. H. 448; *Gotcheus v. Matheson* (N. Y. 1870), 58 Barb. 152, 40 How. Prac. 97; *Goetcheus v. Matthewson* (1875), 61 N. Y. 420; *Huber v. Rely* (1866), 53 Pa. St. (3 P. F. Smith), 112, 23 Leg. Int. 228; *McCafferty v. Guyer* (1868), 59 Pa. St. (9 P. F. Smith) 109; *Brightly, Elect. Cas.* 44.

Effect of conviction.—Whether the penalty imposed by sec. 21, act of Mar. 3, 1865 (13 Stat. 490), on a person found guilty of desertion from the Army of the United States, depriving him of his rights as a citizen of the United States, deprives him also of previously existing right as a citizen of this Commonwealth to vote for members of the general court, and thus disqualifies him as a juror, *quere*. *Commonwealth v. Wong Chung* (1904), 186 Mass. 231, 71 N. E. 292.

Honorable discharge of deserter.—The honorable discharge of a deserter is a formal final judgment passed by the Government upon his entire military record, and a declaration that he left the service in a status of honor. This applies to a soldier in the volunteer service equally with a soldier in the Regular Army. *Lander v. U. S.* (1873), 9 Ct. Cl. 242.

Naturalization.—An alien who had deserted from the military service, and had been convicted and sentenced therefor by a court-martial, refused citizenship. *In re Gnadt* (D. C. 1920), 269 Fed. 189.

2214. Instruction in common branches at post schools.—Schools shall be established at all posts, garrisons, and permanent camps at which troops are stationed, in which the enlisted men may be instructed in the common English branches of education, and especially in the history of the United States; and the Secretary of War may detail such officers and enlisted men as may be necessary to carry out this provision. It shall be the duty of the post or garrison commander to set apart a suitable room or building for school and religious purposes. *R. S. 1231.*

2215. Vocational instruction at post schools.— * * * In addition to military training, soldiers while in the active service shall hereafter be given the opportunity to study and receive instruction upon educational lines of such character as to increase their military efficiency and enable them to return to civil life better equipped for industrial, commercial, and general business occupations. Civilian teachers may be employed to aid the Army officers in giving such instruction, and part of this instruction may consist of vocational education either in agriculture or the mechanic arts. * * * *Sec. 27, act of June 3, 1916 (39 Stat. 186).*

2216. Regulation of vocational instruction.— * * * The Secretary of War, with the approval of the President, shall prescribe rules and regulations for conducting the instruction herein provided for, and the Secretary of War shall have the power at all times to suspend, increase, or decrease the amount of such instruction offered as may in his judgment be consistent with the requirements of military instruction and service of the soldier. *Sec. 27, act of June 3, 1916 (39 Stat. 186).*

2217. Transfer of enlisted men to obtain vocational instruction.— * * * *Provided, however,* That the Secretary of War may, in his discretion, in order to carry out the last provision, select one or more and not exceeding three regiments of Infantry, Cavalry, or Field Artillery to be stationed at a regimental post within the continental limits of the United States on or before July first, nineteen hundred and seventeen, and may transfer from such regiment to other organizations any enlisted man or men who do not desire educational or vocational training and instruction such as is contemplated by the concluding paragraph of section twenty-seven of the National Defense Act approved June third, nineteen hundred and sixteen, and may transfer thereto from other organizations a number of enlisted men to be selected under such rules and regulations as he may prescribe who do desire such instruction and training or may receive recruits thereto sufficient to bring the enlisted strength of the regiment up to that authorized by law. * * * *Act of May 12, 1917 (40 Stat. 59).*

2218. Conditions of educational and vocational instruction.— * * * During such part of the year beginning July first, nineteen hundred and seventeen, and thereafter as the enlisted men of the regiment so selected shall not be engaged on field service or in field training they shall be under training or instruction nine hours of each day, or as near that number of hours as possible, Sundays and holidays excepted, at least three hours of each day to be devoted to military training and six hours of each day, or as nearly that as possible, to educational and vocational training and instruction such as is contemplated by the concluding paragraph of section twenty-seven of the National Defense Act. The educational and vocational training to be had under civilian instructors employed for that purpose under such rules and regulations as the Secretary of War shall prescribe: *And provided further,* That said civilian instructors, as well as the discipline of the said post, shall be under the jurisdiction of the military authorities, under such rules and regulations as the Secretary of War may prescribe. *Act of May 12, 1917 (40 Stat. 60).*

2219. Means for vocational instruction.—For the employment of the necessary civilian instructors in the most important trades, and for the payment of their traveling expenses, as authorized under existing law; for the purchase of carpenter's, machinist's, mason's, electrician's, and such other tools and equipment

as may be required, including machines used in connection with the trades; for the purchase of materials, live stock (including fowls), and other supplies necessary for instruction and training purposes and the construction of such buildings needed for vocational training in agriculture; for shops, storage, and shelter of machinery as may be necessary to carry out the provisions of section 27 of the Act approved June 3, 1916, authorizing, in addition to the military training of soldiers while in the active service, means for securing an opportunity to study and receive instruction upon educational lines of such character as to increase their military efficiency and enable them to return to civil life better equipped for industrial, commercial, and general business occupations, part of this instruction to consist of vocational education either in agriculture or the mechanic arts, \$3,500,000: * * * *Act of June 5, 1920 (41 Stat. 965), making appropriations for the support of the Army: Vocational training.*

Similar provisions appear in previous appropriation acts.

2220. Special training at colleges, etc.—That the Secretary of War is authorized to assign to educational institutions, for special and technical training, soldiers who enter the military service under the provisions of this Act in such numbers and under such regulations as he may prescribe; and is authorized to contract with such educational institutions for the subsistence, quarters, and military and academic instruction of such soldiers. *Sec. 7, act of Aug. 31, 1918 (40 Stat. 957).*

The title of the act of Aug. 31, 1918, declares it to be generally amendatory of the act of May 18, 1917 (40 Stat. 76).

2221. Vacant.

CHAPTER 35.

DRAFT FOR MILITARY SERVICE.

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2222. Liability to military service.—That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of eighteen and forty-five years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States. *Sec. 1, act of Apr. 22, 1898 (30 Stat. 361).*

After the beginning of the World War, by the act of May 18, 1917 (40 Stat. 76), the President was authorized to raise the Regular Army to its maximum strength, and to draft into the military service of the United States any and all members of the National Guard and the National Guard Reserves, and to raise by draft an additional force of 500,000 enlisted men. By the same act he was authorized in his discretion to raise an additional force of 500,000 men and recruit training units for each component of the Army. The act of July 9, 1918 (40 Stat. 894), authorized the President during each fiscal year to raise by draft the maximum number of men which might be trained and used during such year until the conclusion of the war.

See also 2239, post.

As to composition of Army of the United States, see 2113, ante.

As to composition of the organized peace establishment, see 2114, ante.

As to composition of the militia of the United States, see 2504, post.

Notes of Decisions.

Powers of Congress.—The organization of the Army of the United States is specifically conferred by the Constitution upon Congress. *Ex parte Rieley* (N. Y. 1867), 2 Abb. Prac. (N. S.) 334.

Powers of States.—The laws and regulations for the efficiency of the United States Army being vested by the Constitution in the General Government, the States can not, either through their legislative or judicial departments, regulate or circumscribe the powers of the United States in reference thereto. *In re Fair* (C. C. 1900), 100 Fed. 149.

Persons subject to service.—Every citizen of sufficient age and capacity is under obligation to render military service to the country, when required, and is subject to draft for such service. *Lanahan v. Birge* (1862), 30 Conn. 438.

There is nothing in this act to suggest an age limit in the Volunteer Army differing from that in the Regular Army, and it does not affect R. S. 1117 (superseded by 2169, ante). *In re Burns* (C. C. 1898), 87 Fed. 796.

2223. Selective draft preferred over voluntary enlistment for the World War.—That the enlisted men required to raise and maintain the organizations of the Regular Army and to complete and maintain the organization embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, or if and whenever the President decides that they can not effectually be so raised or maintained, then by selective draft; and all other forces hereby authorized, except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training cadres from other forces. * * * *Sec. 2, act of May 18, 1917 (40 Stat. 77).*

Notes of Decisions.

Validity.—The grant to Congress of power to raise and support armies, considered in conjunction with the grants of power to declare war, to make rules for the government and regulation of the land and naval forces, and to make laws necessary and proper for executing granted powers (as provided by art. 1, sec. 8, of the Constitution), includes the power to compel military service, exercised by the selective service act. *Selective Draft Law Cases* (1918), 245 U. S. 866.

The constitutionality of the selective service act may be upheld against the following objections: (1) That by some of its administrative features it delegates Federal power to State officials; (2) that it vests both legislative and judicial power in administrative officers; (3) that, by exempting ministers of religion and theological students under certain conditions and by relieving from strictly military service members of certain religious sects whose tenets deny the moral right to engage in war, it is repugnant to the First Amendment, as establishing or interfering with religion; and (4) that it creates involuntary servitude in violation of the Thirteenth Amendment. *Id.* Accord: *Jones v. Perkins* (D. C. 1917), 243 Fed. 997; *aff.* (1918), 245 U. S. 390; *Frank v. Murray* (C. C. A. 1918), 248 Fed. 865; *U. S. v. Olson* (D. C. 1917),

253 Fed. 233; *Rhodes v. Tatum* (Tex. Civ. App. 1918), 206 S. W. 114.

This act does not violate the Fifth Amendment, as depriving one of his property without due process of law, as respects his office or employment, for, in a just sense, there is no such property right. *U. S. v. Olson* (D. C. 1917), 253 Fed. 233.

This act is not *ex post facto* as respects aliens, for while Congress could not affect an alien's right to come into the country by change thereafter in the requirements for admission, nevertheless in all other respects his status after entry is the same as that of a citizen. *U. S. v. Bell* (D. C. 1918), 248 Fed. 992.

See also notes to 2785, post.

Draft for foreign service.—The army into which an enlisted man enters is not limited to services such as those for which it is asserted the militia only may be used. *Selective Draft Law Cases* (1918), 245 U. S. 866.

The common law right to "remain within the realm" can not prevail against an explicit provision of an act of Congress acting within its constitutional powers. *Jones v. Perkins* (D. C. 1917), 243 Fed. 997; *aff.* (1918), 245 U. S. 390.

Status of persons of draft age.—This act does not give persons within the draft ages any military status solely by virtue of their

being within such ages, but they retain their ordinary status as civilians and citizens until it is changed by their selection	for service. Ex parte McDonald (D. C. 1918), 253 Fed. 99; Ex parte Henry (D. C. 1918), 253 Fed. 208.
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2224. First draft authorized during the World War.—That in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized— * * * Third. To raise by draft as herein provided, organize and equip an additional force of five hundred thousand enlisted men, or such part or parts thereof as he may at any time deem necessary, * * * *Sec. 1, act of May 18, 1917 (40 Stat. 76).*

Notes of Decisions.

Construction.—The provision in terms declaring the President "authorized" to raise troops held not to delegate the power vested in Congress to raise an army,	but merely to commit to him execution of the scheme of Congress. <i>Angelus v. Sullivan (C. C. A. 1917), 246 Fed. 54.</i>
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2225. Second draft authorized during the World War.—Fourth. The President is further authorized, in his discretion and at such time as he may determine, to raise and begin the training of an additional force of five hundred thousand men organized, officered, and equipped, as provided for the force first mentioned in the preceding paragraph of this section. *Sec. 1, act of May 18, 1917 (40 Stat. 77).*

2226. Annual drafts authorized during the World War.—That the authority conferred upon the President by the Act approved May eighteenth, nineteen hundred and seventeen, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," is hereby extended so as to authorize him during each fiscal year to raise by draft as provided in said Act and Acts amendatory thereof the maximum number of men which may be organized, equipped, trained, and used during such year for the prosecution of the present war until the same shall have been brought to a successful conclusion. *Chap. XXI, act of July 9, 1918 (40 Stat. 894).*

2227. Quotas drafted from localities in proportion to the population.— * * * Quotas for the several States, Territories, and the District of Columbia, or subdivisions thereof, shall be determined in proportion to the population thereof, and credit shall be given to any State, Territory, District, or subdivision thereof, for the number of men who were in the military service of the United States as members of the National Guard on April first, nineteen hundred and seventeen, or who have since said date entered the military service of the United States from any such State, Territory, District, or subdivision, either as members of the Regular Army or the National Guard. * * * *Sec. 2, act of May 18, 1917 (40 Stat. 78).*

2228. Each locality required to furnish its full quota of drafted men.— * * * *Provided,* That notwithstanding the exemptions enumerated herein, each State, Territory, and the District of Columbia shall be required to supply its quota in the proportion that its population bears to the total population of the United States. * * * *Sec. 4, act of May 18, 1917 (40 Stat. 79).*

That if under any regulations heretofore or hereafter prescribed by the President persons registered and liable for military service under the terms of the Act of Congress approved May eighteenth, nineteen hundred and seventeen, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," are placed in classes for the purpose of determining their relative liability for military service, no provision of said

Act shall prevent the President from calling for immediate military service under regulations heretofore or hereafter prescribed by the President all or part of the persons in any class or classes except those exempt from draft under the provisions of said Act, in proportion to the total number of persons placed in such class or classes in the various subdivisions of the States, Territories, and the District of Columbia designated by the President under the terms of said Act; or from calling into immediate military service persons classed as skilled experts in industry or agriculture, however classified or wherever residing. *Joint Res. 29, May 16, 1918 (40 Stat. 554).*

That in the determination of quotas for the several States, Territories, and the District of Columbia, or subdivision thereof, to be raised for military service under the terms of the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, the provisions of the joint resolution approved May sixteenth, nineteen hundred and eighteen, providing for the calling into military service of certain classes of persons registered and liable for military service under the said Act, shall apply to any or all forces heretofore or hereafter raised under the provisions of said Act for any State, Territory, District, or subdivision thereof, from and after the time when such State, Territory, District, or subdivision thereof has completed or completes its quota of forces called and furnished under the President's proclamation dated July twelfth, nineteen hundred and seventeen. *Chap. XI, act of July 9, 1918 (40 Stat. 883-884).*

2229. Period of service for drafted men.—That the service of all persons selected by draft and all enlistments under the provisions of the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, shall be for the period of the war, unless sooner terminated by discharge or otherwise. Whenever said war shall cease by the conclusion of peace between the United States and its enemies in the present war, the President shall so declare by a public proclamation to that effect, and within four months after the date of said proclamation or as soon thereafter as it may be practicable to transport the forces then serving without the United States to their home station, the provisions of said Act, in so far as they authorize compulsory service by selective draft or otherwise, shall cease to be of force and effect. *Sec. 4, act of June 15, 1917 (40 Stat. 217).*

For act providing that certain statutes whose operation is contingent upon the existence of a state of war shall be construed as if the World War had ended on Mar. 3, 1921, see 2835, post.

2230. Local draft boards.— * * * The President is hereby authorized, in his discretion, to create and establish throughout theseveral States and subdivisions thereof and in the Territories and the District of Columbia local boards, and where, in his discretion, practicable and desirable, there shall be created and established one such local board in each county or similar subdivision in each State, and one for approximately each thirty thousand of population in each city of thirty thousand population or over, according to the last census taken or estimates furnished by the Bureau of Census of the Department of Commerce. Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the Military Establishment, to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision or area in which the respective

boards will have jurisdiction under the rules and regulations prescribed by the President. Such boards shall have power within their respective jurisdictions to hear and determine, subject to review as hereinafter provided, all questions of exemption under this Act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President, except any and every question or claim for including or excluding or discharging persons or classes of persons from the selective draft under the provisions of this Act authorizing the President to exclude or discharge from the selective draft "Persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment, or the effective operation of the military forces, or the maintenance of national interest during the emergency." * * * *Sec. 4, act of May 18, 1917 (40 Stat. 79).*

Notes of Decisions

Validity.—This section is not a law respecting an establishment of religion, or prohibiting the free exercise thereof, inhibited by the First Amendment. *Selective Draft Law Cases (1918)*, 245 U. S. 366; *U. S. v. Stephens (D. C. 1917)*, 245 Fed. 956; affirmed (1918), 247 U. S. 504.

Status of boards.—The boards which this section authorizes the President to create are not courts, the creation of which, by the Constitution, is vested in Congress. *U. S. v. Stephens (D. C. 1917)*, 245 Fed. 956; affirmed (1918), 247 U. S. 504.

A member of a local draft board is an "officer of the United States," or a person acting on behalf of the United States in an official function, within the meaning of sec. 39, Criminal Code, making it an offense to give or offer a bribe to any such officer or person. *U. S. v. Bordonaro (D. C. 1918)*, 253 Fed. 477.

Special tribunals, such as local and district boards, created by the selective service act, are quasi judicial bodies of inferior and limited jurisdiction, and have authority to hear and determine only such matters as the law directs. *Ex parte Beck (D. C. 1917)*, 245 Fed. 967.

Members of local draft boards have no authority to waive any of the provisions of the selective service act or the regulations made thereunder. *U. S. v. Finley (D. C. 1917)*, 245 Fed. 871.

In view of the regulations thereunder, this section, declaring that local boards shall have charge to determine all questions including or discharging individuals, does not confer on such boards the power to determine whether an individual subject to the act failed to register. *Ex parte Fuston (D. C. 1918)*, 253 Fed. 90.

Proceedings on an alien's claim for exemption under the selective service act are analogous to proceedings before boards of immigration, and the applicants have an

unquestionable right to a fair hearing. *Ex parte Hutfles (D. C. 1917)*, 245 Fed. 798.

As the local board is a public body, exercising quasi judicial functions in passing on the right of exemption, a court of equity has no jurisdiction to interfere with such a board's exercise of its functions. *Bonifaci v. Thompson (D. C. 1917)*, 252 Fed. 878.

A relator duly certified into the military service by local and district boards can not obtain his release because he has convinced the adjutant general of his State that the examination by the medical officers of the local board was insufficient. The determination of the exemption board is final save for appeal to the President. *U. S. v. Commanding Officer (D. C. 1918)*, 248 Fed. 1005.

The summons to a drafted person claiming exemption, to appear before the exemption board under sec. 101 of the Selective Service Regulations, is notice to him to present all the evidence he has in support of his claim. *U. S. ex rel. Kotzen v. Local Exemption Board (D. C. 1918)*, 252 Fed. 245.

Under the Selective Service Regulations, local boards have the widest possible latitude in informing themselves of the truth or falsity of statements made by registrants, and such boards are not in any way restricted to what would be competent legal evidence in a judicial proceeding. *Brown v. Spelman (D. C. 1918)*, 254 Fed. 215.

A drafted man ordered to report for service but remaining in hiding until after the draft boards were abolished may be tried by court-martial for desertion without a preliminary investigation before the draft board, as such investigation under a presidential order was a mere procedural step, the abolition of which does the drafted man no harm. *U. S. ex rel. Young v. Lehman (D. C. 1920)*, 265 Fed. 852.

Findings of local boards.—Civil courts have no jurisdiction to grant relief by habeas corpus against the orders of the draft boards unless it be made to appear that the action of such boards was arbitrary or capricious. The denial of a rehearing on a claim for draft exemption by a district board is not arbitrary action. *Ex parte Tinkoff*, 254 Fed. 222.

Local and district draft boards have the widest possible latitude for the purpose of informing themselves of the truth or falsity of statements made by registrants. They are not in any way restricted as to what would be competent legal evidence in judicial proceedings. *Brown v. Spelman* (D. C. 1918), 254 Fed. 215.

Civil courts can not review and grant relief against orders of local and district draft boards unless it appears that such boards have acted without or in excess of their jurisdiction, or that the proceedings have been unfair, or show an abuse of discretion. *Id.*

A local board certified for service a Russian subject, who had not declared his intention of becoming a citizen and was therefore not subject to the selective-draft act (40 Stat. 76). His claim of exemption and affidavit had been filed in due form and were undisputed, and he was denied a hearing. The board exceeded its authority, and its action was void. Failure of one certified for service by a local draft board, although not subject to draft, to appeal to the district board, does not exclude the jurisdiction of a civil court to discharge him from the Army on habeas corpus, where the local board, before making its order, had consulted with and obtained the approval of the district board, and the appeal would have been vain. *Ex parte Cohen*, 254 Fed. 711.

The applicant petitioned for a writ of habeas corpus. He had filed a questionnaire with his local draft board claiming exemption on the ground of alienage. The board considered his claim and placed him in class 1 as qualified for military service. He made an application for a review of his claim for exemption which the board refused. On this point a civil court is without jurisdiction to review the action of the local board on habeas corpus. *Ellen v. Johnson*, 254 Fed. 909.

The draft boards are purely executive agencies, and their error, committed against those who are within the draft law, is executive error in the enforcement of discretionary regulations. In *re Klitzerow* (D. C. 1918), 252 Fed. 805.

The decision of the local board and of the State adjutant general that a registrant is within the draft age will not be

upset by the courts where the registrant was given a fair hearing and no manifest abuse of discretion is shown. *Brown v. Spelman* (D. C. 1918), 254 Fed. 215.

A draft board classified a registrant in class 5-F upon his questionnaire; they were not satisfied with this classification, however, and gave him notice to appear and give oral testimony bearing on his right to deferred classification. He did not appear and the board reclassified him in class 1-A. He took no appeal, and relied on the original classification. Held, the court will not disturb the finding of the local board. The statement of the registrant in his questionnaire is not evidence in his behalf, and the board is entitled to call for oral testimony; in the absence of such testimony it may treat the registrant as subject to draft. *U. S. ex. rel. Kotzen v. Local Exemption Board* (D. C. 1918), 252 Fed. 245.

Petitioner, a registrant under the selective-service law, was called for service by a local board. Thereafter he applied to the district board for deferred classification, and his application was granted before the time he was required to report. Notwithstanding this decision of the district board, and apparently without any new finding, the local board had him taken into custody. Why this was done does not appear in the opinion. Held, his petition for a writ of habeas corpus should be sustained; the court has jurisdiction to decide whether the district board had power to make a superseding determination; and the court is of opinion that such power exists up to the time of induction defined in the regulations, namely, the hour at which the local board has notified the registrant to report. In *re McDonald* (D. C. 1918), 253 Fed. 99.

On a petition for a writ of habeas corpus, it appeared that petitioner did not register on the registration day, June 5, 1917. Later the local board demanded that he register, and being advised that he would be subject to prosecution if he did not, he registered, and later, under protest, filed with the board two questionnaires, partly filled out. In both he stated his age as 31 years. The board, after considering affidavits to the same effect filed by him, and other statements obtained by them, determined that he was under 31 years of age, and ordered him to report immediately for duty. He failed to do so, and was arrested as a deserter. Held, as the petitioner's registration card and answers in the questionnaires showed that he was more than 31 years of age on June 5, 1917, the local board acquired no jurisdiction over him whatever, and was without authority to

investigate, of its own motion, the question of his age, to place him on the draft list, or to adjudge him a deserter. The petition should be granted. *Ex parte Fuston* (D. C. 1918), 253 Fed. 80; compare *ex parte Dunn* (D. C. 1918), 250 Fed. 871.

A note to sec. 101, Selective Service Regulations of May 18, 1917, requires local boards to scrutinize claims for exemption on the grounds of alienage, and "before classifying an alleged alien in class V, to satisfy themselves beyond reasonable doubt that the registrant claiming such exemption is not a citizen of the United States and has not declared his intention to become a citizen." The burden is upon the registrant to adduce evidence sufficient to satisfy the board of his alienage, and it is not the province of the court to determine the sufficiency of such evidence in a habeas corpus proceeding. *U. S. ex. rel. Kotsen v. Local Exemption Board No. 157 of City of New York*, 252 Fed. 245.

A United States district court has no jurisdiction in certiorari proceedings to review the finding of a local board. *U. S. v. Rauch* (D. C. 1918), 253 Fed. 814.

A bill in equity will not lie to restrain the members of a local board and The Adjutant General from requiring a registrant, who had been denied exemption, to do military service. The jurisdiction of a court of equity, unless enlarged by statute, is limited to the protection of property rights. The registrant has no property right in his employment. The district board is a public body exercising quasi judicial functions under another department of the Government, and a court of chancery has no jurisdiction to interfere with its duties. *Bonifaci v. Thompson*, (D. C. 1917), 252 Fed. 878.

Questions of exemption on account of membership in a religious sect opposed to war are for the determination of local and district boards, and their findings can not be reviewed by courts, unless they are without jurisdiction or denied the claimant a fair hearing. *Frankie v. Murray* (C. C. A. 1918), 248 Fed. 805.

Aliens.—Local and district boards have jurisdiction to determine whether a registrant is an alien enemy, not subject to be drafted into the military service. *U. S. v. Kinhead* (D. C. 1918), 248 Fed. 141; affirmed (C. C. A. 1918), 250 Fed. 692.

The decision of a local board against a claim for exemption as an alien is final where a full hearing is granted, but reviewable if a fair hearing is denied or if the board acts without, or in excess of, its jurisdiction or the proceedings are manifestly unfair. *Angelus v. Sullivan* (C. C. A. 1917), 246 Fed. 54; *Ex parte Thieret* (C. C. A. 1920), 268 Fed. 472.

Nondeclarant aliens.—Construing the selective-draft act of May 18, 1917 (40 Stat. 76-83), the court held, (1) that a nondeclarant alien is not automatically exempted by the statute. (2) That where a treaty is contrary to the provisions of a later act of Congress, the treaty is to that extent ineffectual, but the selective-draft act does not violate any treaty which exempts aliens, for it recognizes the right of nondeclarant aliens to be exempted and provides a method for asserting the right of exemption. (3) That the petitioner, an Austro-Hungarian, waived his exemption by not claiming it. (4) That the declaration of war against Austria-Hungary did not entitle the petitioner to a release. (5) That the findings of the local board are conclusive where there is any evidence to support them, and where a fair hearing has been granted. Mere general allegations of denial of a fair hearing are insufficient. (6) That before a petitioner is entitled to a writ of habeas corpus he must exhaust his remedies under the President's regulations. The petitioner in this case had not done so. Consequently, the writ of habeas corpus was denied. *Ex parte Blaskovic* (D. C. 1918), 248 Fed. 327; *Ex parte Tinkoff* (D. C. 1918), 254 Fed. 222.

A nondeclarant alien, drafted into service under the selective-draft act of May 18, 1917 (40 Stat. 76), will not be released by the courts on a showing that his failure to secure exemption as such alien was due to his ignorance of the English language. The act gives the military authorities the right to take for service every registered person in the United States who does not claim exemption or obtain discharge according to the manner provided in the act; it is mandatory and must be strictly followed. *Lehto v. Scott*, 251 Fed. 767.

A nondeclarant alien who was of such age as to be subject to military service under the selective-draft act of May 18, 1917 (40 Stat. 76), attempted to claim exemption as such alien, and also upon the ground that he had a dependent wife. By reason of his limited knowledge of the English language and the fact that his hearing before the board was hurriedly conducted, the board understood him to claim exemption on the dependency ground alone. This claim being disallowed, he was ordered to report for mobilization, and upon his failure to do so, he was arrested and held as a deserter. Held, that the action of this board, though unfair and irregular, was not void, and was binding until properly vacated. The military authorities had the power to hold and punish him for desertion, but by reason of the irregular procedure by the board it should en-

tain his petition to reopen his case. His habeas corpus petition must be dismissed. *Ex parte Romano* (D. C. 1918), 251 Fed. 762.

Effect of marriage of registrant.—Where a registrant was married June 27, 1917, and there was no finding by the local board that the marriage was not entered into with a primary view of evading military service, the action of the board in placing registrant in class I will not be reviewed by the courts unless the registrant was denied a fair hearing or the action of the board is so manifestly unfair and unjust as to make it apparent that the rights of the registrant have been disregarded; even the fact that the court would have reached a different conclusion from that of the local draft board can not be held sufficient to warrant the court in holding that the hearing was unfair. *Boltano v. Dist. Board* (D. C. 1918), 250 Fed. 812.

Rehearing or reopening case.—Both the local and district boards, within their respective jurisdictions, retain the power to hear and determine matters pertaining to a registrant until the hour specified in the notice of the local board when he is required to report for service; and where, after notice by a local board to a registrant to report for service, before the time arrived he was given deferred classification by the district board on industrial grounds, he could not lawfully be arrested and imprisoned at the instance of the local board for failure to report. *Ex parte McDonald* (D. C. 1918), 253 Fed. 99.

After certifying relator to local board for failure to claim exemption, district board has lost jurisdiction and can not find that his alienage was not established. *Ex parte Beck* (D. C. 1917), 245 Fed. 967.

Where a drafted person claimed exemption from military service on the ground of alienage, and upon being summoned, under sec. 100, Selective Service Regulations, to prove his claim, failed to establish it, the reopening of the case rested in the sound discretion of the exemption board. *U. S. ex rel. Kotsen v. Local Exemption Board* (D. C. 1918), 252 Fed. 245.

While the action of the local board becomes final against a registrant under the selective service act, unless appealed from within five days, a local board, having given registrant a classification to which his questionnaire showed he was not entitled, may correct the error some months later. *Ex parte Short* (D. C. 1918), 253 Fed. 839.

The denial of a rehearing on a claim for draft exemption by a district board is not

arbitrary action. *Ex parte Tinkoff* (D. C. 1918), 254 Fed. 222.

Review by courts.—This section creates independent tribunals to carry out the act, over which the civil courts exercise no supervisory power. *Ex parte Hutfils* (D. C. 1917), 245 Fed. 798.

Determination by local and district boards provided for under this act of questions of exemption is conclusive, unless the boards were without jurisdiction or a fair hearing was denied. *Angelus v. Sullivan* (C. C. A. 1917), 246 Fed. 54; *Franke v. Murray* (C. C. A. 1918), 248 Fed. 865; *Ex parte Platt* (D. C. 1918), 253 Fed. 413; *Ex parte Hutfils* (D. C. 1917), 245 Fed. 798; *Ex parte McDonald* (D. C. 1918), 253 Fed. 99.

Whether persons certified meet physical and medical requirements is solely a question for the exemption boards, and not for the courts. *In re Traina* (D. C. 1918), 248 Fed. 1004; *De Genaro v. Johnson* (D. C. 1918), 249 Fed. 504.

Where petition for habeas corpus and certiorari against a local board does not show petitioner has complied with act and regulations thereunder, or ever presented to local and district boards reason of ignorance assigned in the district court for failure to do so, relief asked against refusal of the boards to exempt him must be denied. *Summertime v. Local Board* (D. C. 1917), 248 Fed. 832.

A district court has no jurisdiction to review, on habeas corpus, the action of a local or district board, in calling to service an alien who has waived his claim to exemption and been duly classified for service under the rules in Class 1. *Ex parte Beales* (D. C. 1918), 252 Fed. 177.

As under sec. 61, Selective Service Regulations, a local board, upon a claim that through error or fraud a person registered who is not subject to registration, can only require such person to submit his claim in writing and transmit the same to the adjutant general of the State, mandamus or certiorari will not lie to compel the local board to strike from the draft list the name of one who claimed to have registered through error; it not appearing that he had submitted his claim in writing for transmission to the adjutant general. *Brown v. Spelman* (D. C. 1918), 255 Fed. 863.

Habeas corpus.—A person denied a full and fair hearing on a claim of exemption under the act may, if restrained of his liberty, sue out a writ of habeas corpus. *Angelus v. Sullivan* (C. C. A. 1917), 246 Fed. 54; *Ex parte Hutfils* (D. C. 1917), 245 Fed. 798.

Habeas corpus is proper remedy to test whether a quasi judicial body, such as exemption boards created under this act, are acting without the scope of their authority. *U. S. v. Mitchell* (D. C. 1918), 248 Fed. 997.

A registrant certified into the military service can not have the decision of the examining board as to his physical condition reviewed by habeas corpus; hence one so certified can not, where he refused to undergo an operation as directed by the military authorities, for the cure of a pre-existing trouble, obtain his discharge under habeas corpus. *De Genaro v. Johnson* (D. C. 1918), 249 Fed. 504.

Where a drafted person, claiming exemption as an alien, by mistake waived exemption in his questionnaire, he had a remedy by appeal to the local board for correction, under sec. 99, Selective Service Regulations, and where, after notice of his classification under sec. 100, he, through ignorance, allowed himself to be inducted into the service, he still had a remedy under sec. 139, by appeal to the commanding officer of the mobilisation camp, and was not entitled to relief by habeas corpus. *Ex parte Kuswieski* (D. C. 1918), 251 Fed. 977.

Where a local draft board, upon the facts stated in a registrant's questionnaire, found him subject to service and gave him a classification, which was affirmed by the district board, a court can not on habeas corpus review its action in refusing to reopen the case. *Ellen v. Johnson* (D. C. 1918), 254 Fed. 909.

Certiorari.—Certiorari will not issue to review the action of local and district boards in making determination as to deferred classification under executive regulations promulgated under the selective service act, for the act creates a system for executive enforcement, and proceedings of

the draft boards, as to those within the scope of the act, are not in the same category as those of quasi judicial tribunals. *In re Kitzrow* (D. C. 1918), 252 Fed. 865.

Certiorari, which under R. S. 716 a Federal court may issue wherever appropriate, will not be issued to review classification by a local board under the act, because it is an executive body, since there is no power in the court, on a question of fact, to substitute its opinion for that of the board, and because there is a remedy by habeas corpus, which is not a discretionary writ, as is certiorari. *U. S. v. Rauch* (D. C. 1918), 258 Fed. 814.

Effect of improper certification.—Where certification of relator into military service was improper under the selective service act, relator being entitled to exemption as nondeclarant alien, he is, upon being arrested as a deserter and held for trial by court-martial, entitled to habeas corpus to secure his release. *Ex parte Beck* (D. C. 1917), 245 Fed. 967.

Where a nondeclarant alien, who was not subject to military service and who claimed his exemption, was inducted into service by the draft boards, without a fair hearing, their action is not void, though irregular, and hence, the alien having failed to report, the military authorities have jurisdiction to hold him for desertion. *Ex parte Romano* (D. C. 1918), 251 Fed. 762.

A petitioner, admittedly liable for service under the selective service act, whose claim for exemption has been improperly denied but who has notwithstanding been inducted into the military service, is within the jurisdiction of draft boards and is subject to punishment for violation of army discipline. *Ex parte Tinkoff* (D. C. 1919), 254 Fed. 912.

2231. District draft boards.— * * * The President is hereby authorized to establish additional boards, one in each Federal judicial district of the United States, consisting of such number of citizens, not connected with the Military Establishment, as the President may determine, who shall be appointed by the President. The President is hereby authorized, in his discretion, to establish more than one such board in any Federal judicial district of the United States, or to establish one such board having jurisdiction of an area extending into more than one Federal judicial district.

Such district boards shall review on appeal and affirm, modify, or reverse any decision of any local board having jurisdiction in the area in which any such district board has jurisdiction under the rules and regulations prescribed by the President. Such district boards shall have exclusive original jurisdiction within their respective areas to hear and determine all questions or claims for including or excluding or discharging persons or classes of persons from the

selective draft, under the provisions of this Act, not included within the original jurisdiction of such local boards. * * * *Sec. 4, act of May 18, 1917 (40 Stat. 79).*

See notes to 2230, ante.

2232. Decisions of district draft boards final.— * * * The decisions of such district boards shall be final except that, in accordance with such rules and regulations as the President may prescribe, he may affirm, modify or reverse any such decision. * * * *Sec. 4, act of May 18, 1917 (40 Stat. 80).*

Notes of Decisions.

See notes to 2230, ante.

Findings of local board.—A citizen of Austria, claimed exemption before a local board on account of alienage and filed an affidavit in support thereof. The local board denied his claim, and the district board affirmed the action of the local

board whereupon he brought a bill in equity to restrain the local board from certifying his name to the military authorities for military service. Bill dismissed for lack of jurisdiction. *Angelus v. Sullivan (C. C. A. 1917), 246 Fed. 54.*

2233. Appointment and removal of members of draft boards.— * * * Any vacancy in any such local board or district board shall be filled by the President, and any member of any such local board or district board may be removed and another appointed in his place by the President, whenever he considers that the interest of the nation demands it. * * * *Sec. 4, act of May 18, 1917 (40 Stat. 80).*

2234. Regulations for the administration of the draft.— * * * The President shall make rules and regulations governing the organization and procedure of such local boards and district boards, and providing for and governing appeals from such local boards to such district boards, and reviews of the decisions of any local board by the district board having jurisdiction, and determining and prescribing the several areas in which the respective local boards and district boards shall have jurisdiction, and all other rules and regulations necessary to carry out the terms and provisions of this section, and shall provide for the issuance of certificates of exemption, or partial or limited exemptions, and for a system to exclude and discharge individuals from selective draft. *Sec. 4, act of May 18, 1917 (40 Stat. 80).*

Notes of Decision.

Judicial notice.—The regulations prescribed by the President under this section for ascertaining the status of persons selected thereunder, and their right to ex-

emption, will be taken judicial cognizance of by the courts, and have the force of law. *U. S. v. Miller (D. C. 1918), 249 Fed. 985.*

2235. Traveling expenses of members of draft boards and employees.— * * * *Provided,* That per diem allowances in lieu of subsistence not exceeding \$4 may be paid to those employees authorized to travel, and to members of the boards when in attendance upon board meetings at too great a distance from their homes to enable them to live there. *Act of Nov. 4, 1918 (40 Stat. 1027).*

2236. Services of State and Federal officers available to enforce the Selective Draft Act.—That the President is hereby authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States, Territories, and the District of Columbia, and subdivisions thereof, in the execution of this Act, and all officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of

the District of Columbia, and all persons designated or appointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct, and all such officers and agents and persons so designated or appointed shall hereby have full authority for all acts done by them in the execution of this Act by the direction of the President. * * * *Sec. 6, act of May 18, 1917 (40 Stat. 80).*

Notes of Decisions.

Constitutionality of act.—The power of Congress to compel military service is derived from the authority given to Congress by the Constitution to declare war and to raise armies; those powers are not qualified or restricted by the provisions of

Art. I, sec. 8, Constitution; the power to call for military duty under the authority to declare war and raise armies is in no way limited by the subordinate provisions of the Constitution concerning the militia. *Cox v. Wood*, 247 U. S. 3.

2237. Penalty envelopes used in administering the draft.— * * * Correspondence in the execution of this Act may be carried in penalty envelopes bearing the frank of the War Department. * * * *Sec. 6, act of May 18, 1917 (40 Stat. 81).*

2238. Penalty for failure to observe requirements of the Selective Draft Act.— * * * Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said Act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations, or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this Act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct. *Sec. 6, act of May 18, 1917 (40 Stat. 81).*

* * * *Provided, however,* That nothing herein contained shall be construed as effective to terminate the military status of any person now in desertion from the military or naval service of the United States, nor to terminate the liability to prosecution and punishment under the selective service law, approved May 18, 1917 (Fortieth Statutes, page 76), of any person who failed to comply with the provisions of said Act, or of Acts amendatory thereof. * * * *Joint Res. 64, March 3, 1921 (41 Stat. 1360).*

See also notes to 2357, post.

Notes of Decisions.

Indictment.—Indictment charging that defendants conspired to interfere with

registration under the act, by publication in a newspaper of advice not to register,

sufficiently charged a public offense. *Sugar v. U. S.* (D. C. 1917), 243 Fed. 423; (*C. C. A. 1918*), 252 Fed. 79.

False statements by a defendant as to his resources and income and as to the dependency of his wife are false statements "as to fitness and liability" of defendant for service, in violation of this section. *U. S. v. Miller* (D. C. 1918), 249 Fed. 985.

A conspiracy to prevent persons from registering, as required by law, is one to defraud the United States by obstructing a "function of the Government." *Firth v. U. S.* (C. C. A. 1918), 253 Fed. 36.

Indictments, charging perjury in obtaining exemption by falsely swearing that defendant has a wife dependent on his labor for support, upheld. *Hardwick v. U. S.* (C. C. A. 1919), 257 Fed. 505; *Whiteside v. U. S.* (C. C. A. 1919), 257 Fed. 509.

An indictment charging that defendant, being of draft age, "for the purpose of obtaining a more deferred classification," when before the local board willfully, feloniously, and corruptly made certain false statements, to the effect that his father was dependent on him for support, held to charge an offense under this section. *Kreibich v. U. S.* (C. C. A. 1919), 261 Fed. 168.

Offenses.—The provision of this section that it shall be a misdemeanor to violate any provision or regulations made thereunder does not preclude punishment under military law of one subject thereto because he was duly certified into the service, the section itself expressly excepting those subject to military law. *Frank v. Murray* (1918), 243 Fed. 865.

Conspiracy to resist raising of army by conscription held conspiracy to resist the authority of the United States, though the selective service act had not then been passed. *U. S. v. Bryant* (D. C. 1917), 245 Fed. 682.

The making of a notarial certificate, falsely reciting that doctors, whose statements were filed in support of a claim for exemption, appeared before the notary, falls within the scope of the section, even though the statements by the doctors were not in themselves false. *U. S. v. Blakeman* (D. C. 1918), 251 Fed. 306.

The provision of this section making it an offense to aid another to evade the requirements of the act, and the provision of title I, sec. 3, of the espionage act, post, 2857, making it an offense to willfully obstruct the recruiting or enlistment service, are in pari materia. The facts which constitute an offense under the first provision would constitute an offense under the second; and the first provision being specific and the second general, the first governs where the facts bring the offense within it.

Smith v. U. S. (C. C. A. 1920), 265 Fed. 489.

A count charging that defendant, pursuant to a scheme to defraud the United States, sent through the mails an application for employment with the Y. M. C. A., in which he made false statements and representations in respect to his age, character, qualifications, and present salary, held not to charge an offense, since it alleged no facts showing that defendant was a person subject to the draft and where the position he sought would not, as a matter of law, exempt him from selection by draft. *Underwood v. U. S.* (C. C. A. 1920), 267 Fed. 412.

While it is an offense to urge a violation of law under cover of advocating the principles of a political party, a defendant, whose intent is to secure adherents to such party, who did not urge violation of the selective service act, although making immaterial and unfounded arguments concerning it, is not guilty of the offense of attempting to induce those subject to said act to violate it. *U. S. v. Baker* (D. C. 1917), 247 Fed. 124.

Nonofficial persons may be convicted of a violation of this section. *O'Connell v. U. S.* (1920), 253 U. S. 142.

Questionnaire.—A registrant who, instead of indicating any claim for exemption or deferred classification by a cross in the proper column and signing his name thereto, as required by Selective Service Regulations, wrote across the sheet that he claimed exemption under the Constitution from all military service, except for certain named purposes, was guilty of a violation of this section. *Uhl v. U. S.* (C. C. A. 1920), 263 Fed. 79.

Conspiracy.—The overt act in a conspiracy, under this section, need not of itself be an unlawful act; nor is it necessary to allege in what manner the overt act would tend to effect the object of the conspiracy. *Gruher v. U. S.* (C. C. A. 1918), 255 Fed. 474.

An indictment charging conspiracy to violate the selective service act by preventing registration thereunder and by inducing desertion of those who had registered, is not duplicitous as charging two conspiracies, one of which could not by its nature originate until the other was terminated, since the intention to secure the desertion of those who had registered under the act and plans to effect that intention could have been formed before the day of registration. *Haywood v. U. S.* (C. C. A. 1920), 268 Fed. 795, 805.

An indictment for conspiracy under sec. 6, Penal Code, post, 2849, and secs. 19, 37,

and 832, Penal Code, and title I, sec. 4, of the espionage act, post 2858, held sufficient. *Anderson v. U. S.* (C. C. A. 1920), 269 Fed. 65.

Double jeopardy.—Conspiring with another to aid a third person in evading the selective service act and the aiding of such person in evading the act are distinct offenses, requiring different proof, and an acquittal on the first charge is not a bar to prosecution for the second. *Bens v. U. S.* (C. C. A. 1920), 266 Fed. 152.

A defendant who had been tried by court-martial under A. W. 58, post, ch. 52, for desertion based on failure to file a questionnaire and feeling to escape military duty, and acquitted, can not thereafter be tried by a Federal district court for failing to

answer his questionnaire. *U. S. v. Block* (D. C. 1920), 262 Fed. 205.

Pending indictment.—A man who had been ordered to entrain for military service, and thereby became subject to military law, can, notwithstanding his indictment for violation of the selective service act, be delivered by the civil authorities to the military authorities for trial by court-martial for desertion. This section makes only a person "not subject to military law" guilty of a misdemeanor. Appellant had no right to elect trial by the civil courts, nor were the civil officers bound to bring him to trial, but clearly had the right to surrender him to the military authorities. *Ex parte Thieret* (C. C. A. 1920), 268 Fed. 472.

2239. Persons liable to be drafted.— * * * Such draft as herein provided shall be based upon liability to military service of all male citizens and male persons residing in the United States, not alien enemies, who have declared their intention to become citizens, between the ages of eighteen and forty-five, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act: *Provided*, That the President may draft such persons liable to military service in such sequence of ages and at such time or times as he may prescribe: * * * *Sec. 2, act of May 18, 1917 (40 Stat. 77), as amended by sec. 1, act of Aug. 31, 1918 (40 Stat. 955).*

See also 2222, ante.

As originally enacted, this section was as follows: "Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act."

Notes of Decisions.

Construction.—The word "liability" in the phrase "liability to military service" is used in its ordinary sense of obligation or responsibility. *Ex parte Lamachia* (D. C. 1918), 250 Fed. 814.

Waiver of exemption.—While the act does not apply to nondeclarant aliens, an alien who filed a questionnaire in which he stated that he did not claim exemption as an alien may be called for service, though he made this answer under the mistaken impression that he would otherwise be deported. It is not claimed that any member of the board so advised him. This answer, constituting a waiver, makes him subject to the law. *Ex parte Lamachia*, 250 Fed. 814.

Aliens.—Writ of habeas corpus by one Bartalini. Bartalini, a Russian alien, took out his first papers but allowed seven years to elapse without further action, and thus lost his right to become a citizen of the United States on the first declaration.

He notified the local board of these facts, but was nevertheless certified for duty as a declarant alien. The court held that Bartalini was still a declarant within the meaning of the selective draft act. The basis of the seven-year limitation upon the use of first papers is not a presumption that the person neglecting to become a citizen has resumed his old and interrupted allegiance to a foreign power. A declarant must make use of his papers within the seven years solely because Congress has enacted a statute which places that limit upon the use of the old declaration of intention in filing a petition to become a citizen. During all these seven years he is a declarant. Thereafter, and so long as he is in this country, he remains a declarant, since he is in the position of having stated his intention to become a United States citizen and to give up his former allegiance. He does not at the end of the seven years resume, in all respects,

the national rights of those who have never filed such a declaration of intention. *United States v. Mitchell* (D. C. 1918), 248 Fed. 997.

A resident alien who has declared his intention to become a citizen of the United States, and has exercised the rights of citizenship, is liable to be drafted into the military service of the United States. *In re Wehlitz* (1863), 16 Wis. 443, 84 Am. Dec. 700.

An alien Austrian, who had first papers, was drafted before the declaration of war against Austria, and sought discharge from military service on habeas corpus, for the reason that he was born in Austria, and since the declaration of war with Austria was no longer subject to the draft. The writ was dismissed. So long as such aliens are a part of the drafted Army, they are subject to its laws and regulations and can not be discharged by a court. Congress has authority to legislate for their discharge, if it so desires. *Halpern v. Commanding Officer* (D. C. 1918), 248 Fed. 1003; *U. S. v. Bell* (D. C. 1918), 248 Fed. 1002.

A subject of Austria-Hungary, unless excused as a nondeclarant alien, is not entitled to exemption because by reason of a subsequent declaration of war with his country he has become an alien enemy. *Ex parte Blazekovic* (D. C. 1918), 248 Fed. 327.

An alien who had declared his intention seven years before, but whose petition for admission to citizenship had been denied because he illegally sold intoxicating liquor, is still a declarant within the meaning of the act. *Gazzola v. Commanding Officer* (D. C. 1918), 248 Fed. 1001; see also *U. S. v. Mitchell* (1918), 248 Fed. 997.

A nondeclarant alien who did not present his claim for exemption to local or district boards and failed thereafter to apply for a reopening of his case, pursuant to regulations, and who has been certified into the military service, is not entitled to exemption on writ of habeas corpus. *Ex parte Tinkoff* (D. C. 1918), 254 Fed. 222; *Ex parte Lamachia* (D. C. 1918), 250 Fed. 814; *U. S. v. Bell* (D. C. 1917), 248 Fed. 995; *U. S. v. Finley* (D. C. 1917), 245 Fed. 871; *Ex parte Hutfils* (D. C. 1917), 245 Fed. 798; *contra*, *Ex parte Beck* (D. C. 1917), 245 Fed. 967.

The courts will not release a nondeclarant alien who, by reason of his lack of understanding of English, fails to comply with the draft law. *Lehto v. Scott* (D. C. 1918), 251 Fed. 767.

Nondeclarant aliens are not automatically excluded from the draft, but are required to register, and present and obtain their exemptions through boards provided

to determine questions of exemption. *Ex parte Hutfils* (D. C. 1917), 245 Fed. 798; *U. S. v. Finley* (D. C. 1917), 245 Fed. 871; *Ex parte Blazekovic* (D. C. 1918), 248 Fed. 327; *Napora v. Rowe* (C. C. A. 1919), 256 Fed. 832.

In requiring nondeclarant aliens to present their claims for exemption to exemption boards they are not being deprived of treaty rights securing them against liability for military service. *Ex parte Blazekovic* (D. C. 1918), 248 Fed. 327.

A nondeclarant alien who did not present his claim for exemption to local or district boards and failed thereafter to apply for a reopening of his case is not entitled, upon certification into the military service, to exemption upon writ of habeas corpus. *U. S. v. Bell* (D. C. 1917), 248 Fed. 995.

Treaties exempting aliens from service.—As the selective service act declares all laws in conflict therewith to be suspended, a treaty entered into before the enactment of the act, exempting an alien from military service, does not of itself entitle him now to an exemption, for the treaty, if in conflict with the act, is repealed by the latter. *Ex parte Blazekovic* (D. C. 1918), 248 Fed. 327; *Summertime v. Local Board* (D. C. 1917), 248 Fed. 832.

A resident subject of Spain of registration age, who has declared his intention to become a citizen, held subject to the selective service act, although by the treaty of Apr. 20, 1903 (33 Stat. 2108), he is expressly exempted from compulsory military service in the United States. *Ex parte Larrucea* (D. C. 1917), 249 Fed. 981; see also *Ex parte Hutfils* (1917), 245 Fed. 798.

Classification.—One subject to the draft who had been fully pardoned after being convicted of a felony should not be placed in a deferred classification, pursuant to sec. 21 of the original regulations or sec. 79 of those of Nov. 8, 1917. *U. S. ex rel. Schwartz v. Commanding Officer* (D. C. 1918), 252 Fed. 314.

A man inducted into the service under the selective service act, but discharged a few days afterwards through error, held properly classified in the same position he occupied before the error was committed. *Ex parte Fischer* (D. C. 1918), 253 Fed. 159.

Marriage.—Where the circumstances were such as to induce a belief that the marriage of a registrant was for the primary purpose of evading military service, he has the burden of showing to the draft board that such was not the case. *Boitano v. District Board* (D. C. 1918), 250 Fed. 812.

The marriage of a person subject to selective draft, after his registration, can

not defeat the Government's right to his services. *Ex parte Tinkoff* (D. C. 1918), 254 Fed. 222.

Purchase of discharge.—A person enlisting in the Army and subsequently purchasing his discharge held not exempt from draft under this section or independently of it. *Ex parte Cohen* (D. C. 1917), 245 Fed. 667.

Status of drafted men.—Under this section and art. 2 of the Articles of War, ch. 52, post, one certified into the military service under the selective service act is, from the date certified, subject to military law and to punishment as a deserter in case he has disobeyed the summons, and can not escape liability because he has not taken an oath. *Franke v. Murray* (C. C. A. 1918), 248 Fed. 865; *Ex parte Thieret* (C. C. A. 1920), 268 Fed. 472.

Habeas corpus.—Writ of habeas corpus will not issue, when the investigation would, in effect, be an appellate review of what has been determined by some other tribunal of competent jurisdiction, as a determination by the established military tribunal of liability to draft, depending on citizenship, in the absence of arbitrary denial of rights. *U. S. v. Heyburn* (D. C. 1917), 245 Fed. 360.

Release of relator, improperly certified into the military service, can not be denied on the ground that respondent, an Army officer holding the relator in custody, might, on complying with the writ, be liable to punishment by his superiors for disobedience of orders, respondent's remedy being by appeal. *Ex parte Beck* (D. C. 1917), 245 Fed. 967.

Declarant alien, certified into the military service under the selective draft act, may by habeas corpus raise the question of the propriety of his certification. *U. S. v. Bell* (D. C. 1918), 248 Fed. 992.

The burden of proof rests on complainant in habeas corpus to prove his alienage beyond a reasonable doubt. *U. S. ex rel. Kotzen v. Local Exemption Board* (D. C. 1918), 252 Fed. 245.

Rejection of petitioner's claim for exemption as an alien who had not declared his intention, his showing being *prima facie* and in no way met, but being disbelieved merely because other claims for exemption had been supported by false affidavits, was arbitrary and unfair, amounting to refusal to investigate, and his application for a writ of habeas corpus should have been granted. *Arbitman v. Woodside* (C. C. A. 1919), 258 Fed. 441.

2240. Compulsory registration for the draft.—That all male persons between the ages of eighteen and forty-five, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President, and, upon proclamation by the President or other public notice given by him or by his direction stating the time or times and place or places of any such registration, it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army; officers and enlisted men of the National Guard while in the service of the United States; officers of the Officers' Reserve Corps and enlisted men in the Enlisted Reserve Corps while in the service of the United States; officers and enlisted men of the Navy and Marine Corps; officers and enlisted and enrolled men of the Naval Reserve Force and Marine Corps Reserve while in the service of the United States; officers commissioned in the Army of the United States under the provisions of this Act; persons who, prior to any day set for registration by the President hereunder, have registered under the terms of this Act or under the terms of the resolution entitled "Joint resolution providing for the registration for military service of all male persons citizens of the United States and all male persons residing in the United States who have, since the fifth day of June, nineteen hundred and seventeen, and on or before the day set for the registration by proclamation by the President, attained the age of twenty-one years, in accordance with such rules and regulations as the President may prescribe under the terms of the Act approved May eighteenth, nineteen hundred and seventeen, entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' " approved May twentieth, nineteen hundred and eighteen, whether called for service or not, and diplomatic representatives, technical attachés of foreign embassies and legations, consuls general, consuls,

vice consuls, and consular agents of foreign countries, residing in the United States, who are not citizens of the United States to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of any such proclamation or any such other public notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided shall be guilty of a misdemeanor and shall, upon conviction in a district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year and shall thereupon be duly registered:

* * * *Sec. 5, act of May 18, 1917 (40 Stat. 80), as amended by sec. 3, act of Aug. 31, 1918 (40 Stat. 955).*

Notes of Decisions.

Validity.—The selective service act is not unconstitutional as conferring legislative power upon the President, notwithstanding the presidential proclamation of the same date, issued as directed by this section of the act, which required registration of citizens specified therein; such proclamation having been designed to give notice of, and explain the act, but not to have the force of a law. *Sugar v. U. S.* (C. C. A. 1918), 252 Fed. 74.

Offenses.—A person claiming to be over 31 years of age was indicted and convicted for failing to register in accordance with the selective draft act. The court held the conviction justified by the evidence and held that there was no error in admitting baptismal records, and copies of application for a pension and for a homestead, executed by the defendant's mother, wherein she set out his age. *Phelan v. United States* (C. C. A. 1918), 249 Fed. 43.

Persons subject to registration failed to register, and were prosecuted for this failure in the United States court in Rhode Island. While the cases were pending, these persons were registered and called for service by the local board and, failing to appear, were arrested for desertion, with the assent of the United States attorney for Rhode Island. A trial by court-martial resulted in conviction and sentence to 20 years' imprisonment in the Atlanta penitentiary, where they are now confined. Held, that their petition for a writ of habeas corpus should be denied. It is not essential that registration occur on the date specified in the President's proclamation; the regulations authorized by the selective draft act May 18, 1917 (40 Stat. 76), provide for late registration. The provision of sec. 5, that any person failing to present himself for registration shall be guilty of a misdemeanor, shall, upon conviction in a district court, be punished by

imprisonment for one year, and "shall thereupon be duly registered," does not require that registration be deferred until after the completion of his punishment under sentence of the civil court. It was apparently inserted in order to dispel any doubt whether a man so prosecuted was still subject to registration and military service, and also to make sure that such defendants would not escape registration, by making it mandatory in such cases. In other words, it was intended to coordinate the action of the draft boards and of the courts. *Ex parte Dunn* (D. C. 1918), 250 Fed. 871.

Aiding, abetting, etc., violations of this section an offense, in view of sec. 332, Criminal Code, though at common law there could be no accessory to a misdemeanor. *Rutherford v. U. S.* (1918), 245 U. S. 480.

Where petitioners, who had been registered during pendency of prosecution against them for failure to register as required by this section, failed to respond to call to report for service, and thus became deserters, the question whether they should first be tried under military or civil law of the United States is a matter to be settled between the respective departments of the Government, and petitioners can not defeat the sentence of a court-martial based on their desertion, because of pendency of prosecution against them for the civil offense involved. *Ex parte Dunn* (D. C. 1918), 250 Fed. 871.

In a prosecution for willful failure and refusal to register, the indictment can not be supported solely by affidavits of defendant as to his age made long before the selective service act went into effect. *Gordner v. U. S.* (C. C. A. 1920), 261 Fed. 910.

Indictment.—Indictment for aiding, abetting, etc., a person in failing to register, held sufficient, without alleging that he was a citizen or person, not an alien enemy,

who had declared his intention of becoming a citizen, in view of this section. *Ruthberg v. U. S.* (1918), 245 U. S. 480.

In view of R. S. 1025, an inaccurate statement as to the voting precinct in which defendant resided, contained in an indictment charging failure to register as required by the selective service act, must, in view of the usual knowledge prevailing as to such locations, be disregarded. *Breitmayer v. U. S.* (C. C. A. 1918), 249 Fed. 929.

An indictment charging failure to register, which alleged that accused was a male between the ages of 21 and 30, and was not an officer or enlisted man of the Regular Army or Navy, nor of the National Guard or Naval Militia, nor of the Officers' Reserve Corps, nor of the Reserve Corps in the service of the United States, and was not in any manner exempted nor excused from registering, sufficiently negative the exceptions in the act. The indictment need not allege the age of accused, nor negative accused's bad health, though inability, through sickness, to register, might disprove willful refusal to register. *Sugar v. U. S.* (C. C. A. 1918), 252 Fed. 74.

An indictment alleging a failure to register as required by the selective service act, etc., is not faulty because failing to set out in full the President's proclamation as to registration, where the statement with reference to the proclamation was sufficient to furnish the defendant information and notice required for every purpose. *U. S. v. Olson* (D. C. 1917), 253 Fed. 233.

Conspiracy.—Conspiracy to prevent persons subject to registration under selective draft under this section held a conspiracy to defraud the United States, within sec. 87, Criminal Code, and punishable as such. *U. S. v. Galleanni* (D. C. 1917), 245 Fed. 977.

In a prosecution for conspiracy to violate this section, the common design is the essence of the charge, and proof that the alleged conspirators knowingly worked together for a common illegal purpose will establish a conspiracy; it not being necessary to show a formal explicit agreement or undertaking. *U. S. v. McHugh* (D. C. 1917), 253 Fed. 224.

Indictment for conspiracy to violate title I, sec. 3, of the espionage act, post, 2857, charging conspiracy subsequent to June 15, 1917, to induce persons liable to service under the selective draft act to refuse to submit to registration, held to charge a conspiracy to induce persons who failed to register at time set by President's proclamation not to register under this section, making provision for subsequent reg-

istration. *U. S. v. Prieth* (D. C. 1918), 251 Fed. 946.

Where a conspiracy to resist the enforcement of the draft by force has been fully formed, its subsequent abandonment does not relieve the conspirators from criminal liability under sec. 6, Criminal Code. *Orear v. U. S.* (C. C. A. 1919), 261 Fed. 257.

Registration.—An officer or enlisted man of a National Guard unit, not called into Federal service until after the date fixed by Presidential proclamation for registration in accordance with this section, does not fall within the provision exempting officers and enlisted men of the National Guard in service of the United States from registration. *Breitmayer v. U. S.* (C. C. A. 1918), 249 Fed. 929.

Late registration is expressly authorized under the act. *Ex parte Dunn* (D. C. 1918), 250 Fed. 871.

Although an alien has not been subjected to military duty, he must register where so required by sec. 53, Selective Service Regulations, and be classified as provided by rule 12, unless the right of exemption is waived. *Ex parte Kuswesi* (D. C. 1918), 251 Fed. 977.

Determination of age.—Under this section, a local board, authorized to determine questions of exemption, has no jurisdiction to investigate on its own motion the question of the age of a person who had not registered and place him on the draft list, though he asserted he was not within the age limits prescribed. *Ex parte Fuston* (D. C. 1918), 253 Fed. 90.

Absence from home.—Under this section, and the regulations thereunder, which require persons subject to registration who were absent from the United States on registration day to register within five days after their return, such a person can not avoid the duty by again leaving the United States before the expiration of the five days. *U. S. v. Scott* (D. C. 1918), 253 Fed. 281.

Neither the act nor the regulations made thereunder required registrants to remain in their permanent homes and actual places of legal residence until drafted into military service, so that it was not a violation of sec. 19, Criminal Code, denouncing conspiracy to injure, etc., any citizen in the exercise of any right secured by the Constitution or laws of the United States, for defendants to conspire to deport from Arizona citizens of Arizona some of whom had registered under the selective service act. *U. S. v. Wheeler* (D. C. 1918), 254 Fed. 611.

Whether defendant, domiciled with his parents in Seattle, Wash., by registering

with a local draft board in Idaho while on his way to New York to study had intended to evade military duty, held a question for the jury. *Pass v. U. S.* (C. C. A. 1919), 256 Fed. 731.

Correction of questionnaire.—In the absence of fraud, the correction of a questionnaire is a matter for the War Department, and not for the courts. *Ex parte Kuswieski* (D. C. 1918), 251 Fed. 977.

Admissibility of evidence.—In a prosecution for failure to register, baptismal records, certified copy of application for pension, and application for homestead executed by defendant's mother, wherein she set out his age, are admissible, and the baptismal record having been made by a Roman Catholic priest, it is competent for the priest to testify as to the tenets of his faith concerning baptism of infants. *Phelan v. U. S.* (C. C. A. 1918), 249 Fed. 43.

Certified copy of birth record in county clerk's custody admitted in evidence. *Breitmayer v. U. S.* (C. C. A. 1918), 249 Fed. 929.

In a prosecution for conspiracy to obstruct the draft, minutes of meetings of an executive committee kept by one of defendants, a committee member, showing passage of resolutions pursuant to which the other defendant caused circulars to be printed and mailed to persons drafted, held admissible against both defendants. *U. S. v. Schenck* (D. C. 1918), 253 Fed. 212.

The jury could determine the physical condition of defendant's father, whom defendant claimed to be dependent upon him for support, from their observation of him while on the stand, etc., and his physical infirmities need not be established by medical expert testimony. *U. S. v. McIlugh* (D. C. 1917), 253 Fed. 224.

Judicial notice.—The date of the drawing under the selective service act is a historical fact, of which the court takes judicial notice without proof. *U. S. v. Sugarman* (D. C. 1917), 245 Fed. 604.

It must be presumed that the grand jurors were cognizant of the fact that the day originally set for persons subject to draft was June 5, 1917. *U. S. v. Prieth* (D. C. 1918), 251 Fed. 946.

Status of persons selected for service.—Petitioner, who had been arrested under an indictment charging petit larceny, was not entitled to be discharged from his imprisonment by the State authorities, because he had been ordered, before his conviction and sentence, by the local draft board to report

for transportation to a mobilization camp. *Ex parte Calloway* (D. C. 1917), 246 Fed. 263.

Under this section, failure of one prosecuted for nonregistration to respond during pendency of prosecution to call for service will make him a deserter, punishable under military law. *Ex parte Dunn* (D. C. 1918), 250 Fed. 871.

A registrant was charged with crime and pleaded guilty in a State court. The pronouncing of sentence was deferred a few days. During the interval, the local board served him with a notice to report for military service, at a time earlier than the day on which sentence was to be pronounced. It was contended on his behalf that the local board had thereby inducted him into the military service, and that after the date on which he was ordered to appear for such service the civil court held that the action of the local board was without legal effect, because a person in his status, awaiting sentence by a State court, is not a person liable to be called to military service; no reason appeared for interfering in this case with the action of the State court in sentencing and retaining custody of the registrant. *In re Henry* (1918), 253 Fed. 208.

Conspiracy to defeat registration.—Defendants were convicted under an indictment charging conspiracy to defeat registration for military service of male persons between the ages of 21 and 30 years, as provided for by the selective draft act of May 18, 1917 (40 Stat. 76). The overt act charged was the circulation of a pamphlet and cartoons to the effect that war had been declared without a referendum vote; that conscription had been thrust upon the people; and advising that a demand be made for the repeal of the conscription act. On appeal it was argued that since the acts in question occurred prior to the time for registration and since citizens who were called to register had not commenced any service to the Government, persuading them not to register was not an obstruction of a function of the Government. The court overruled this contention and affirmed the conviction, holding that preparation for war by registration for military service is as much a function of the Government as the actual waging of war. (This case arose previous to the enactment of the espionage act.) *Flrth et al. v. United States* (C. C. A. 1918), 253 Fed. 36.

2241. Age limits for registering for the draft.— * * * *Provided further,* That persons shall be subject to registration as herein provided who shall have attained their eighteenth birthday and who shall not have attained their

forty-sixth birthday on or before the day set for the registration in any such proclamation by the President or any such other public notice given by him or by his direction, and all persons so registered shall be and remain subject to draft into the forces hereby authorized unless exempted or excused therefrom as in this Act provided: *Provided further*, That the President may at such intervals as he may desire from time to time require all male persons who have attained the age of eighteen years since the last preceding date of registration and on or before the next date set for registration by proclamation by the President, except such persons as are exempt from registration hereunder, to register in the same manner and subject to the same requirements and liabilities as those previously registered under the terms hereof: * * * *Sec. 5, act of May 18, 1917 (40 Stat. 80), as amended by sec. 3, act of Aug. 31, 1918 (40 Stat. 956).*

As originally enacted, the age limit was between 21 and 30 years, both inclusive.

Public Resolution 30, May 20, 1918 (40 Stat. 557), contained a provision "that during the present emergency all male persons, citizens of the United States and all male persons residing in the United States, who have, since the fifth day of June, nineteen hundred and seventeen, and on or before the day set for the registration by proclamation by the President, attained the age of twenty-one years, shall be subject to registration in accordance with regulations to be prescribed by the President, and that upon proclamation by the President, stating the time and place of such registration, it shall be the duty of all such persons, except such persons as are exempt from registration under the Act of May eighteenth, nineteen hundred and seventeen, and any Act or Acts amendatory thereof, to present themselves for and submit to registration under the provisions of said Act approved May eighteenth, nineteen hundred and seventeen, and they shall be registered in the same manner and subject to the same requirements and liabilities as those previously registered under the terms of said Act: *Provided*, That those persons registered under the provisions of this Act shall be placed at the bottom of the list of those liable for military service, in the several classes to which they are assigned, under such rules and regulations as the President may prescribe."

Notes of Decisions.

Indictment.—In an indictment under this section for failure to register, it is sufficient to allege that the delinquent was a male person between the ages of 21 and 30, and it is not necessary to allege that he is a citizen of the United States, or a person, not an alien, who has declared his intention to become a citizen, since these latter mat-

ters go only to the liability to military duty under the act, and not to the duty to register. *Ruthenberg v. U. S. (1918), 245 U. S. 480; compare Underwood v. U. S. (C. C. A. 1920), 267 Fed. 412, 417.*

See also notes to the two preceding sections.

2242. Registration of temporary absentees.— * * * *And provided further.* That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein, such registration may be made by mail under regulations to be prescribed by the President: * * * *Sec. 5, act of May 18, 1917 (40 Stat. 80), as amended by sec. 3, act of Aug. 31, 1918 (40 Stat. 956).*

2243. Prosecution for failure to register for the draft.— * * * *Provided*, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act: * * * *Sec. 5, act of May 18, 1917 (40 Stat. 80), as amended by sec. 3, act of Aug. 31, 1918 (40 Stat. 956).*

2244. Officials and ministers exempted from the selective draft.—That the Vice President of the United States, the officers, legislative, executive, and judicial, of the United States and of the several States, Territories, and the District of Columbia, regular or duly ordained ministers of religion, students who at

the time of the approval of this Act are preparing for the ministry in recognized theological or divinity schools, and all persons in the military and naval service of the United States shall be exempt from the selective draft herein prescribed; * * * and the President is hereby authorized to exclude or discharge from said selective draft and from the draft under the second paragraph of section one hereof, or to draft for partial military service only from those liable to draft as in this Act provided, persons of the following classes: County and municipal officials; customhouse clerks; persons employed by the United States in the transmission of the mails; * * * *Sec. 4, act of May 18, 1917 (40 Stat. 78).*

Notes of Decisions.

Validity.—This section is not a law respecting an establishment of religion, or prohibiting the free exercise thereof, inhibited by the First Amendment. *Selective Draft Law Cases* (1918), 245 U. S. 366; *U. S. v. Stephens* (D. C. 1917), 245 Fed. 956; affirmed (1918), 247 U. S. 504.

Meaning of "regular or duly ordained minister of religion."—The ministerial work of a registrant ended shortly after registration and before filing his questionnaire. At the time of the filing of his questionnaire he was chairman of the "Northern California branch of the Peoples' Council." He was not entitled to deferred classification. He was not a "regular or duly ordained minister of religion" within the

meaning of the selective draft act (40 Stat. 78). *Ex parte Short* (D. C. 1918), 253 Fed. 839.

Separable provisions.—Were the provision exempting clergymen and divinity students unconstitutional, it, while failing, would not affect the rest of the act, clearly separable therefrom. Likewise if the provision of this section for exempting persons serving in any capacity that the President declares noncombatant contemplated involuntary servitude, in contravention of the Thirteenth Amendment, it, being separable, would not affect the other provisions, *U. S. v. Stephens* (D. C. 1917), 245 Fed. 956; affirmed (1918), 247 U. S. 504.

2245. Workers in necessary industries exempted from the selective draft.—* * * and the President is hereby authorized to exclude or discharge from said selective draft and from the draft under the second paragraph of section one hereof, or to draft for partial military service only * * * artificers and workmen employed in the armories, arsenals, and navy yards of the United States, and such other persons employed in the service of the United States as the President may designate; pilots; mariners actually employed in the sea service of any citizen or merchant within the United States; persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency; * * * *Sec. 4, act of May 18, 1917 (40 Stat. 79).*

That the provision wherever occurring in section four of said Act, "persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency," be, and is hereby, amended to read as follows:

Persons engaged in industries, occupations, or employments, including agriculture, found to be necessary to the maintenance of the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency. *Sec. 2, act of Aug. 31, 1918 (40 Stat. 955), amending sec. 4, act of May 18, 1917 (40 Stat. 79).*

Notes of Decisions.

Construction.—This section gave no absolute industrial or dependency exemption; the President had authority to revoke, as he did by regulations prior to Dec. 15,

1917, all exemptions and certificates theretofore made. *Ex parte Thieret* (C. C. A. 1920), 268 Fed. 472.

2246. Exemption from the selective draft on account of dependents, or for physical or moral deficiency.—* * * and the President is hereby authorized to exclude or discharge from said selective draft * * * or to draft for partial military service only * * * those in a status with respect to persons dependent upon them for support which renders their exclusion or discharge advisable; and those found to be physically or morally deficient. * * * *Sec. 4, act of May 18, 1917 (40 Stat. 78, 79).*

Notes of Decisions.

Dependency.—Under this section dependency is not a matter of which the courts can take judicial notice. *Ex parte Dostal (D. C. 1917), 243 Fed. 664.*

A "dependent" is a person who is not self-sustaining and relies on another for support, and under the selective service act and regulations, providing for exemption to registrants having dependent parents, the exemption should not be granted if the parent is able to maintain himself, either from property which he owns or from his labor. *U. S. v. McHugh (D. C. 1917), 258 Fed. 224.*

Jurisdiction of courts as to physical or medical standards.—This relator applies for writ of habeas corpus for discharge from

military service on the ground that he is afflicted with a disease which makes necessary his discharge from further service in the Army. He bases his application on the provisions of the selective draft act and the rules thereunder, which direct rejection and discharge from the military service of men afflicted with diseases, which the relator claims to be less severe than that from which he suffers. The court held that it had no jurisdiction to consider the physical or medical standards by which persons otherwise eligible are to be judged either for admission to or discharge from the National Army. *Ex parte Traina (D. C. 1918), 248 Fed. 1004.*

2247. Conscientious objectors exempted from the selective draft.—* * * and nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant; * * * *Sec. 4, act of May 18, 1917 (40 Stat. 78).*

See notes to 2244, ante.

2248. Registrants formerly in the Navy may reenlist.—* * * *And provided further,* That men registered under the provisions of this Act who have served in the Navy of the United States shall, upon their own application, be permitted to reenlist in the naval or marine service of the United States with and by the approval of the Secretary of the Navy. *Sec. 3, act of Aug. 31, 1918 (40 Stat. 956), amending sec. 5, act of May 18, 1917 (40 Stat. 80).*

2249. Removal of cause for exemption from the selective draft.—* * * No exemption or exclusion shall continue when a cause therefor no longer exists. * * * *Sec. 4, act of May 18, 1917 (40 Stat. 79).*

2250. Substitute for a drafted soldier.—* * * and no person liable to military service shall hereafter be permitted or allowed to furnish a substitute for such service; nor shall any substitute be received, enlisted, or enrolled in the military service of the United States; and no such person shall be permitted to escape such service or to be discharged therefrom prior to the expiration of his term of service by the payment of money or any other valuable thing whatsoever as consideration for his release from military service or liability thereto. *Sec. 3, act of May 18, 1917 (40 Stat. 78).*

2251. Aliens to register for the draft.—That the President may by proclamation set a day or days and place or places for the registration for military service of male aliens within designated ages residing within the United States who are citizens or subjects of a foreign country with whose Government the United States has concluded or hereafter concludes a convention or agreement in accordance with the terms of which its citizens or subjects within designated ages, residing within the United States, become under certain conditions liable to be drafted into the military service of the United States; that upon proclamation by the President stating the time and place of such registration it shall be the duty of any such alien, unless exempted from registration by the terms of the President's proclamation, to present himself for and submit to registration under the provisions of the Act approved May eighteenth, nineteen hundred and seventeen, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," and all amendments thereto, and he shall thereupon be registered in the same manner as those previously registered under the terms of said Act; and every such alien shall be deemed to have notice of the requirements of said Act and this joint resolution upon the publication by the President of any such proclamation, and any such alien who shall willfully fail or refuse to present himself for registration or to submit thereto shall be subject to all the provisions and liable to all the penalties provided in said Act or any amendment thereto. *Sec. 1, chap. XII, act of July 9, 1918 (40 Stat. 884).*

See notes to 2239, ante.

2252. Exemption of alien residents from the draft.—That any such alien, when registered, shall be and remain liable to military service in the forces of the United States and subject to draft under the provisions of said convention or agreement and of said Act and all amendments thereto, and subject to such regulations as the President may have prescribed or may prescribe under the terms thereof, unless during the period specified in the convention or agreement concluded with the country whereof he is a citizen or subject and designated in the President's proclamation, he shall have enlisted or enrolled in the military forces of his own country or returned to his own country for the purpose of enlisting or enrolling in its military forces, or unless the country whereof he is a citizen or subject, through its diplomatic representatives, in accordance with the terms of the convention or agreement concluded between the United States and such foreign country, shall issue to such alien a certificate of exemption from military service. *Sec. 2, chap. XII, act of July 9, 1918 (40 Stat. 884).*

See notes to 2239, ante.

2253. Alien resident exempted from the draft by withdrawing his intention of citizenship.—* * * *Provided further,* That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen, and he shall forever be debarred from becoming a citizen of the United States. *Sec. 2, act of May 18, 1917 (40 Stat. 77), as amended by sec. 1, act of Aug. 31, 1918 (40 Stat. 955).*

See notes to 2239, ante.

2254. Liability of alien registrant to draft.—That any such alien, after the expiration of the time fixed by the President's proclamation within which he may enlist or enroll in the military forces of his own country, return to his own country for the purpose of military service, or be exempted through the diplomatic representative of the country whereof he is a citizen or subject, shall be and remain subject in all respects to the terms, provisions, liabilities, and penalties of said Act and all amendments thereto, except as modified by the terms of the convention or agreement concluded between the United States and the country whereof such alien is a citizen or subject, and shall be subject to such regulations as the President may have prescribed or may prescribe under the terms of said Act. *Sec. 3, chap. XII, act of July 9, 1918 (40 Stat. 884).*

See notes to 2239, ante, entitled "Treaties exempting aliens from service."

2255. Induction into military service.—That all men rendered available for induction into the military service of the United States through registration or draft heretofore or hereafter made pursuant to law, shall be liable to service in the Army or the Navy or the Marine Corps, and shall be allotted to the Army, the Navy, and the Marine Corps under regulations to be prescribed by the President: *Provided*, That all persons drafted and allotted to the Navy or the Marine Corps in pursuance hereof shall, from the date of allotment, be subject to the laws and regulations governing the Navy and the Marine Corps, respectively. *Sec. 4, act of Aug. 31, 1918 (40 Stat. 956).*

The title of the act of Aug. 31, 1918, declares it to be generally amendatory of the act of May 18, 1917 (40 Stat. 76).

2256. Restricted military service.— * * * That during the present war the President be, and he is hereby, authorized to enlist for service in the offices of the War Department or under its control or on detached service under its jurisdiction men outside the draft ages, and for the same purpose to draft men within such ages, who have been disqualified by minor physical defects for active service in the Army; to establish regulations under which such enlistments may be made, and to fix the pay and allowances of men so enlisted or drafted, which said pay and allowances shall not exceed those of enlisted men of the Regular Army. * * * *Chap. XX, act of July 9, 1918 (40 Stat. 894).*

2257. Records pertaining to the selective draft.—The unexpended balance of the \$3,500,000, reappropriated in the Army Appropriation Act for the fiscal year 1920, approved July 11, 1919, for the completion, preservation, and transportation of the records pertaining to the draft under the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May 18, 1917, including the employment of the necessary clerical and other help for duty in the office of The Adjutant General of the Army in connection with the arrangement, operation, and maintenance of the files of those records, and for the employment of clerical help required to furnish to the adjutants general of the several States statements of service of all persons from those States who entered the military service during the war with Germany, is hereby reappropriated and made available for the fiscal year 1921, for all expenses, including the employment of clerical and other help in the office of The Adjutant General of the Army, necessary for the completion and preservation of the selective-service records and the completion of the work of furnishing statements of service to adjutants general of States: *Provided*, That this appropriation shall be disbursed by such officer as may be designated by the Secretary of War for the purpose. *Act of June*

5, 1920 (41 Stat. 951), making appropriations for the support of the Army: Completion and preservation of the selective service records.

By the act of July 9, 1918 (40 Stat. 851), a fund of \$15,751,000 was appropriated "for all expenses necessary in the registration of persons available for military service and in the selection of certain such persons and their draft into the military service," of which \$3,500,000 was reappropriated by the act of July 11, 1919 (41 Stat. 109), as set forth above.

CHAPTER 36.

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2258. Officers to be citizens of the United States.—That no part of the appropriations made in this Act shall be available for the salary or pay of any person hereafter, in time of peace, appointed an officer in the Army who is not a citizen of the United States. *Act of Aug. 29, 1916 (39 Stat. 649).*

2259. Execution of commissions.—That hereafter the commissions of all officers under the direction and control of the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, and the Secretary of Agriculture shall be made out and recorded in the respective Departments under which they are to serve, and the Department seal affixed thereto, any laws to the contrary notwithstanding: *Provided*, That the said seal shall not be affixed to any such commission before the same shall have been signed by the President of the United States. *Act of Mar. 28, 1896 (29 Stat. 75).*

Similar previous provisions, as to making out and recording, etc., in the Treasury Department, commissions of all officers employed in levying or collecting the public revenue, of R. S. 238, were superseded by this act.

Notes of Decisions.

Form of commission issued by head of a department.—A commission issued pursuant to the foregoing act should show upon its face that it is the commission of the President, but his actual signature is not necessary. The document should declare the act to be that of the President, performed by the head of the Navy Department as his representative. (1898) 22 Op. Atty. Gen. 82.

Power of department head to issue commission.—The Secretary of the Navy may

issue commissions to the naval officers serving as military governors of the islands of Guam and Tutuila. (1904) 25 Op. Atty. Gen. 292.

A commission, whatever its form, is but evidence of the fact that the President has exercised his constitutional power of appointment; there is no provision of law requiring a specified form of commission to be issued to officers in the military service. *O'Shea v. U. S.*, 28 Ct. Cls. 392.

2260. Officers permanently commissioned in a branch.— * * * and hereafter all appointments in the line of the Army shall be by commission in an arm of the service and not by commission in any particular regiment. *Sec. 2, act of Oct. 1, 1890 (26 Stat. 562).*

Officers of all grades in the Infantry, Cavalry, Field Artillery, Coast Artillery Corps, Corps of Engineers, and Medical Department; officers above the grade of captain in the Signal Corps, Judge Advocate General's Department, Quartermaster Corps, Ordnance Department and Chemical Warfare Service, all chaplains and professors, and the military storekeeper shall be permanently

commissioned in their respective branches. * * * Other officers may be either detailed, or with their own consent, be permanently commissioned, in the branches to which they are assigned for duty. *Sec. 4, act of June 3, 1916 (39 Stat. 167), as amended by sec. 4, act of June 4, 1920 (41 Stat. 760-761).*

Notes of Decisions.

Appointment must be accepted.—An appointment or commission, in order to take effect at all, must be accepted; but when accepted, it takes effect as of and from its date, i. e., the date on which it is completed by the signature of the appointing power, or that as and from which it purports in terms to be operative. See *Marbury v. Madison*, 1 Cranch 137; *U. S. v. Bradley*, 10 Pet. 304; *U. S. v. Le Baron*, 19 How. 78; *Montgomery v. U. S.*, 5 Ct. Cls. 97.

Power to fill vacancy during recess of Senate.—The power of the President to fill a vacancy in the Army during a recess of

the Senate may be exercised by a letter from the Secretary of War, and such a letter may constitute his commission, there being no law which prescribes the form of a military commission. *O'Shea v. U. S.*, 28 Ct. Cls. 392.

Where the President is authorized by law to reinstate a discharged Army officer, he may do so without the advice and consent of the Senate. *Collins v. U. S.*, 14 Ct. Cls. 22.

An officer of the Army or Navy of the United States does not hold his office by contract, but at the will of the sovereign power. *Crenshaw v. U. S.*, 134 U. S. 98.

2261. Number of officers.— * * * On and after July 1, 1920, there shall be * * * five hundred and ninety-nine colonels; six hundred and seventy-four lieutenant colonels; two thousand two hundred and forty-five majors; four thousand four hundred and ninety captains, four thousand two hundred and sixty-six first lieutenants; two thousand six hundred and ninety-four second lieutenants; and also the number of officers of the Medical Department and chaplains, hereinafter provided for, professors as now authorized by law, and the present military storekeeper, who shall hereafter have the rank, pay and allowances of major; and the numbers herein prescribed shall not be exceeded: * * * *Sec. 4, act of June 3, 1916 (39 Stat. 167), as amended by sec. 4, act of June 4, 1920 (41 Stat. 760).*

2262. Additional officers.— * * * Officers now carried as additional numbers shall be included in the numbers provided for by this Act, and, after June 30, 1920, shall no longer be additional, and any officer hereafter appointed, under the provisions of law, to a grade in which no vacancy exists, shall be an additional number in that grade until absorbed, and no longer. * * * *Sec. 127a, added to the act of June 3, 1916 by sec. 51, act of June 4, 1920 (41 Stat. 785).*

2263. Commissions proportioned to enlistments.— * * * *Provided*, That no part of this appropriation shall be paid to any officer of the line of the Army who shall be appointed or promoted in violation of any of the terms next hereinafter specified: That of the whole number of officers of Cavalry, Field Artillery, Coast Artillery Corps, Infantry, and of Engineers serving with the enlisted force of the Corps of Engineers necessary to fill vacancies created or caused in said arms of the service by reason of the second increment, authorized in said arms by Act of Congress approved June third, nineteen hundred and sixteen, not more than one-fourth shall be appointed or promoted until, exclusive of enlisted men belonging to said arms on June thirtieth, nineteen hundred and sixteen, at least one-fourth of the second increment of enlisted men authorized for said arms by said Act shall have been enlisted; not more than one-half of said whole number of officers shall be appointed or promoted until at least one-half of said increment of enlisted men shall have been enlisted; and not more

than three-fourths of said whole number of officers shall be appointed or promoted until at least three-fourths of said increment of enlisted men shall have been enlisted. And all officers promoted in accordance with the terms of this proviso shall take rank, respectively, from the dates on which their promotions shall have become lawful under the terms of this proviso. * * * *Act of May 12, 1917 (40 Stat. 44).*

The action contemplated by this act has been taken.

2264. Temporary commissions in time of war.— * * * In time of war any officer of the Regular Army may be appointed to higher temporary rank without vacating his permanent commission, such appointments in grades below that of brigadier general being made by the President alone, but all other appointments of officers in time of war shall be in the Officers' Reserve Corps. * * * *Sec. 127a, added to the act of June, 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 785).*

2265. Temporary appointment of officers during the World War.—First. * * * Vacancies in the Regular Army created or caused by the addition of increments as herein authorized which can not be filled by promotion may be filled by temporary appointment for the period of the emergency or until replaced by permanent appointments or by provisional appointments made under the provisions of section twenty-three of the national defense Act, approved June third, nineteen hundred and sixteen, and hereafter provisional appointments under said section may be terminated whenever it is determined, in the manner prescribed by the President, that the officer has not the suitability and fitness requisite for permanent appointment. * * * *Sec. 1, act of May 18, 1917 (40 Stat. 76).*

Third. * * * to provide the necessary officers, line and staff, for said force and for organizations of the other forces hereby authorized, or by combining organizations of said other forces, by ordering members of the Officers' Reserve Corps to temporary duty in accordance with the provisions of section thirty-eight of the national defense Act approved June third, nineteen hundred and sixteen; by appointment from the Regular Army, the Officers' Reserve Corps, from those duly qualified and registered pursuant to section twenty-three of the Act of Congress approved January twenty-first, nineteen hundred and three (Thirty-second Statutes at Large, page seven hundred and seventy-five), from the members of the National Guard drafted into the service of the United States, from those who have been graduated from educational institutions at which military instruction is compulsory, or from those who have had honorable service in the Regular Army, the National Guard, or in the volunteer forces, or from the country at large; by assigning retired officers of the Regular Army to active duty with such force with their rank on the retired list and the full pay and allowances of their grade; or by the appointment of retired officers and enlisted men, active or retired, of the Regular Army as commissioned officers in such forces: * * * *And provided further,* That officers with rank not above that of colonel shall be appointed by the President alone, and officers above that grade by the President by and with the advice and consent of the Senate: * * * *Sec. 1, act of May 18, 1917 (40 Stat. 77).*

That the appointments authorized and made as provided by the second, third, fourth, fifth, sixth, and seventh paragraphs of section one and by section eight of this Act, and the temporary appointments in the Regular Army authorized by the first paragraph of section one of this Act, shall be for the period of the

emergency, unless sooner terminated by discharge or otherwise. * * * *Sec. 9, act of May 18, 1917 (40 Stat. 82).*

The above is emergency legislation and no longer operative.
But see 2268, post.

2266. Temporary commissions prior to Dec. 31, 1920.— * * * Whenever, prior to December 31, 1920, any person shall be nominated to the Senate for appointment to fill any office in the Regular Army provided for by this Act, the President alone is authorized to appoint such person temporarily in the United States Army in the grade pertaining to such Regular Army office, to have rank and pay from the same dates as if such appointment were in the Regular Army. Such temporary appointment shall terminate upon acceptance, after confirmation, of the corresponding office in the Regular Army, or on March 4, 1921, if then still unconfirmed. * * * *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 786).*

2267. Retention of emergency officers.— * * * The President is authorized to retain temporarily in service, under their present commissions, such emergency officers as he may deem necessary, but the total number so remaining in service, other than those undergoing treatment for physical reconstruction, shall not at any time exceed the total number of vacancies then existing in the Regular Army. Any such officer may be discharged when his services are no longer required, and all such officers shall be discharged not later than December 31, 1920. All officers of the Regular Army holding commissions granted for the period of the existing emergency, in whatever grade, shall be discharged therefrom not later than June 30, 1920. The President is authorized and directed to retain in service disabled emergency officers until their treatment for physical reconstruction has reached a point where they will not be further benefited by retention in a military hospital or in the military service. * * * *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 786).*

That the President is authorized to retain temporarily in service, under their present commissions, or to discharge and recommitment temporarily in lower grades, such emergency officers as he may deem necessary; but the total number of officers on active duty, exclusive of retired officers and disabled emergency officers undergoing treatment for physical reconstruction, shall at no time exceed seventeen thousand eight hundred and twenty-three. Any emergency officer may be discharged when his services are no longer required, and all such officers shall be discharged not later than December 31, 1920. All officers of the Regular Army holding commissions granted for the period of the existing emergency, in whatever grade, shall be discharged therefrom not later than June 30, 1920. *Act of June 5, 1920 (41 Stat. 977), making appropriations for the support of the Army.*

2268. Provisional appointments.—All laws providing that certain appointments of officers shall be provisional for a period of time are hereby repealed. *Sec. 23, act of June 3, 1916 (39 Stat. 181), as amended by sec. 23, act of June 4, 1920 (41 Stat. 771).*

2269. Order of appointment of second lieutenants.—Except as otherwise herein provided, appointments shall be made in the grade of second lieutenant, first, from graduates of the United States Military Academy; second, from warrant officers and enlisted men of the Regular Army between the ages of twenty-one and thirty years, who have had at least two years' service; and,

third, from reserve officers, and from officers, warrant officers and enlisted men of the National Guard, members of the Enlisted Reserve Corps and graduates of technical institutions approved by the Secretary of War, all between the ages of twenty-one and thirty years. * * * *Sec. 24e, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 774).*

The above topic was treated by sec. 24, act of June 3, 1916 (39 Stat. 182), which has been stricken out by sec. 24, act of June 4, 1920, above cited.

At the same time the proviso of the act of Aug. 11, 1916 (39 Stat. 493), which established the eligibility of an honorably discharged cadet as a civilian candidate for a commission, was apparently rendered null and void.

2270. Graduated cadets commissioned second lieutenants.—That when any cadet of the United States Military Academy has gone through all its classes and received a regular diploma from the academic staff, he may be promoted and commissioned as a second lieutenant to any arm or corps of the Army in which there may be a vacancy and the duties of which he may have been judged competent to perform; and in case there shall not at the time be a vacancy in such arm or corps, he may, at the discretion of the President, be promoted and commissioned in it as an additional second lieutenant, with the usual pay and allowances of a second lieutenant, until a vacancy shall happen. *Act of May 17, 1886 (24 Stat. 50).*

* * * Cadets graduated from the United States Military Academy during the present calendar year shall be commissioned as second lieutenants to date not earlier than July 2, 1920. * * * *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 786).*

This act apparently supersedes R. S. 1213. See notes 2271, post.

Notes of Decisions.

Appointment of subsequent graduates, etc.—The words "such arm or corps," in this section, refer to the arm, the duties of which the graduate has been judged competent to perform. The word "vacancy" means a vacancy in the arm of the service in which the additional second lieutenant is then commissioned. Consequently, where a cadet has been appointed an additional second lieutenant in a designated arm of the service, he remains in such arm until transferred by order of the

President, or upon his own request, and he can not interfere with the assignment of subsequent graduates to other arms of the service. Hence the Secretary of War may assign to cavalry or infantry recent graduates, noncommissioned officers, and civilians, although "additional" second lieutenants remain in the engineers and artillery, and no vacancies exist in the last-named branches. (1891) 20 Op. Atty. Gen. 149; (1897) 21 Op. Atty. Gen. 491.

2271. One additional second lieutenant only to each company.—Only one supernumerary officer shall be attached to any company at the same time under the provisions of the two preceding sections. *R. S. 1215.*

The "two preceding sections," mentioned in this section, were R. S. 1213, 1214, which have been superseded by subsequent provisions. The provision of this section may be applicable to promotions and appointments under such subsequent provisions.

R. S. 1213 provided that any graduate of the Military Academy should be considered a candidate for a commission in any corps for whose duties he might be deemed competent, and, if there should be no vacancy in such corps, he might be attached to it as a supernumerary officer by brevet of second lieutenant, until a vacancy should happen. All vacancies in the grade of second lieutenant were required to be filled by appointment of such graduates, so long as any should remain in the service unassigned, by a provision of sec. 3, act of June 18, 1878 (20 Stat. 150). But the provisions of that section and of said act were superseded by 2270, ante. Act of Mar. 3, 1911 (36 Stat. 1045), and sec. 24, act of June 3, 1916 (39 Stat. 182), which was superseded in part by act of

May 12, 1917 (40 Stat. 44), amended by sec. 2, act of July 9, 1918 (40 Stat. 890), and by sec. 24, act of June 4, 1920 (41 Stat. 774), ante, 2269.

R. S. 1214 provided that noncommissioned officers might be examined for appointment as second lieutenants in any corps of the line for which they might be found qualified, and, if there should be no vacancy in any such corps, any noncommissioned officer so found qualified might be attached to it as a supernumerary officer by brevet of second lieutenant; and any vacancies in the grade of second lieutenant remaining after the appointment of graduates of the Military Academy were required to be filled by promotion of meritorious noncommissioned officers, by secs. 3, 4, act of June 18, 1878 (20 Stat. 150). But these provisions were superseded by the more comprehensive provisions of act of July 30, 1892, post, 2272-2275, sec. 5 of which act expressly repealed secs. 3 and 4 of act of June 18, 1878, providing for the promotion of meritorious noncommissioned officers.

2272. Enlisted men and volunteers eligible for appointment as second lieutenants.—That the President be, and he is hereby, authorized to prescribe a system of examination of enlisted men of the Army, by such boards as may be established by him, to determine their fitness for promotion to the grade of second lieutenant: *Provided*, That all unmarried soldiers under thirty years of age, who are citizens of the United States, are physically sound, who have served honorably not less than two years in the Army, and who have borne a good moral character before and after enlistment, may compete for promotion under any system authorized by this act. *Sec. 1, act of July 30, 1892 (27 Stat. 336).*

* * * Enlisted men of the Regular Army or volunteers may be appointed second lieutenants in the Regular Army to vacancies created by this act, provided that they shall have served one year under the same conditions now authorized by law for enlisted men of the Regular Army. *Sec. 28, act of Feb. 2, 1901 (31 Stat. 756).*

But see 2269, ante. See notes to 2271, ante.

Notes of Decisions.

Enlisted men.—The President may assign enlisted men, who have passed the examination as candidates for commissions, to vacancies that may exist in any corps or arm of the service in which they have

been commissioned, notwithstanding the fact that additional lieutenants remain in other corps unassigned. (1897) 21 Op. Atty. Gen. 491.

2273. Examining boards for selection of second lieutenants.—That the members and recorder of such boards as may be established by the President, under the provisions of the preceding section, shall be sworn in every case to discharge their duties honestly and faithfully; and the boards may examine witnesses, and take depositions, for which purposes they shall have such powers of a court of inquiry as may be necessary. *Sec. 2, act of July 30, 1892 (27 Stat. 336).*

2274. Examination of candidates for second lieutenancy.—That the vacancies in the grade of second lieutenant heretofore filled by the promotion of meritorious non-commissioned officers of the Army, under the provisions of section three of the act approved June eighteenth, eighteen hundred and seventy-eight, shall be filled by the appointment of competitors favorably recommended under this act, in the order of merit established by the final examination. Each man who passes the final examination shall receive a certificate of eligibility, setting forth the subjects in which he is proficient and the especial grounds upon which the recommendation is based: *Provided*, That not more than two examinations shall be accorded to the same competitor. *Sec. 3, act of July 30, 1892 (27 Stat. 336).*

Sec. 3 of act of June 18, 1878 (20 Stat. 150), mentioned in this section, was repealed by section 5 of this act.

Notes of Decisions.

Right to promotion.—A soldier who passes a successful examination and becomes the holder of a certificate is entitled to promotion as second lieutenant after the graduates of the Military Academy shall have been provided for and assigned. (1898) 22 Op. Atty. Gen. 57.

Physical disability.—Although a soldier is primarily entitled to promotion by reason of a certificate of eligibility, yet if he is in fact disqualified to perform military service by reason of physical disability, this would operate to disbar him. The weight of evidence, however, is that he is physically qualified, and consequently he is entitled to the benefits accorded him in this act, unless he is shown to be physically disqualified by a legally constituted Army medical board. (1898) 22 Op. Atty. Gen. 91.

Limiting time within which promotion may be made.—The Secretary of War has

no authority to make a regulation limiting to a specified time, expiring on a given date, the right of promotion of an enlisted man who holds the certificate of eligibility provided by act July 30, 1892 (27 Stat. 336). (1898) 22 Op. Atty. Gen. 54.

Age of candidate for promotion.—The fact that an eligible candidate for promotion has become 30 years of age does not vacate his right to promotion. (1898) 22 Op. Atty. Gen. 54.

Second examination.—A regulation can not be promulgated requiring a successful candidate who holds a certificate of eligibility to undergo a second examination after a specified time, the proviso in this section relative to two examinations being intended to give a nonsuccessful competitor an opportunity to retrieve himself by a reexamination. (1898) 22 Op. Atty. Gen. 54.

2275. Vacation of certificate of eligibility for a second lieutenancy.—That all rights and privileges arising from a certificate of eligibility may be vacated by sentence of a court-martial, but no soldier, while holding the privileges of a certificate, shall be brought before a garrison or regimental court-martial or summary court. *Sec. 4, act of July 30, 1892 (27 Stat. 336).*

Garrison and regimental courts-martial have been abolished by the act of Mar. 2, 1913 (37 Stat. 722).

2276. Age limit for candidates for commissions disregarded during the World War.—That soldiers, during the present emergency, regardless of age and existing law and regulations, shall be eligible to receive commissions in the Army of the United States. They shall likewise be eligible to admission to officers' schools under such rules and regulations as may be adopted for entrance to such schools, but shall not be barred therefrom or discriminated against on account of age. *Sec. 6, act of Aug. 31, 1918 (40 Stat. 956).*

The title of the act of Aug. 31, 1918, declares it to be generally amendatory of the act of May 18, 1917 (40 Stat. 76). It is emergency legislation and no longer operative.

2277. Emergency officers commissioned in the Regular Army.—Not less than one-half of the total number of vacancies caused by this Act, exclusive of those in the Medical Department and among chaplains, shall be filled by the appointment, to date from July 1, 1920, and subject to such examination as the President may prescribe, of persons other than officers of the Regular Army who served as officers of the United States Army at any time between April 6, 1917, and the date of the passage of this Act. A suitable number of such officers shall be appointed in each of the grades below that of brigadier general, according to their qualifications for such grade as may be determined by the board of general officers provided for in this section. No such person above the age of fifty years shall be appointed in a combatant branch, or above the age of fifty-eight in a noncombatant branch. No such person below the age of forty-eight years shall be appointed in the grade of colonel, or below the age of forty-five years in the grade of lieutenant colonel, or below the age of thirty-six years in the grade of major. * * * *Provided, That no officer shall be*

appointed in any branch of the service under the provisions of this section except with the approval of the chief of such branch or officer acting as such. *Sec. 24, act of June 3, 1916 (39 Stat. 182), as amended by sec. 24, act of June 4, 1920 (41 Stat. 771),*

2278. Assignments to regiments.—That officers of grades in each arm of the service shall be assigned to regiments, and transferred from one regiment to another, as the interests of the service may require, by orders from the War Department, * * * *Sec. 2, act of Oct. 1, 1890 (26 Stat. 562).*

See par. 8, A. R. 1913; also notes to 2279, post.

2279. Promotion of officers.—That hereafter promotion to every grade in the Army below the rank of brigadier-general, throughout each arm, corps, or department of the service, shall, subject to the examination hereinafter provided for, be made according to seniority in the next lower grade of that arm, corps, or department: * * * *Sec. 1, act of Oct. 1, 1890 (26 Stat. 562).*

* * * and hereafter all vacancies occurring in the cavalry, artillery, and infantry above the grade of second lieutenant shall, subject to the examination now required by law, be filled by promotion according to seniority from the next lower grade in each arm. *Sec. 2, act of Apr. 26, 1898 (30 Stat. 364).*

That vacancies in the grade of field officers and captains, created by this act, in the cavalry, artillery, and infantry shall be filled by promotion according to seniority in each branch, respectively. * * * *Sec. 28, act of Feb. 2, 1901 (31 Stat. 755).*

* * * Vacancies remaining in grades above the lowest which are not filled by such appointments shall be filled by promotion to date from July 1, 1920, in accordance with the provisions of section 24c hereof. * * * *Sec. 24, act of June 3, 1916 (39 Stat. 182), as amended by sec. 24, act of June 4, 1920 (41 Stat. 771).*

Up to and including June 30, 1920, except as otherwise provided herein, promotions shall continue to be made in accordance with law existing prior to the passage of this Act, and on the basis of the number heretofore authorized for each grade and branch. On and after July 1, 1920, vacancies in grades below that of brigadier general shall be filled by the promotion of officers in the order in which they stand on the promotion list, without regard to the branches in which they are commissioned. Existing laws providing for the examination of officers for promotion are hereby repealed, except those relating to physical examination, which shall continue to be required for promotion to all grades below that of brigadier general, and except also those governing the examination of officers of the Medical, Dental, and Veterinary Corps. Officers of said three Corps shall be examined in accordance with laws governing examination of officers of the Medical Corps, second lieutenants of the Veterinary Corps being subject to the same provisions as first lieutenants. *Sec. 24c, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 774).*

The first three acts set out above are apparently superseded by the act last cited. Subsequent provisions that no more permanent appointments should be made in several of the staff corps and departments, and that officers already holding permanent appointments therein should be promoted according to seniority in the several grades, and any vacancy which could not be filled by such promotion should be filled by detail from the line of the Army were made by secs. 26, 27, act of Feb. 2, 1901, post, 2336, 2337, 2341, 2424, 2288.

Sec. 24, above, provided that emergency officers might be commissioned in the Regular Army. See 2277, ante.

Notes of Decisions.

Promotion and appointment distinguished.—A promotion in the Army differs from an original appointment therein, in that the discretion of the President is confined, in cases of promotion, to certain specific persons, and appointment follows as a rule on vacancy, seniority, and a favorable examination. (1911) 24 Op. Atty. Gen. 254.

See, also (1881) 17 Op. Atty. Gen. 196.

Selection of senior officer.—The act of Oct. 1, 1890, does not make it obligatory upon the President to promote to a vacancy existing in the grade of lieutenant-colonel the senior officer in the next lower grade, if, in his opinion, the record of the officer has been such as to indicate that he is disqualified for promotion. 30 Op. Atty. Gen. 177.

No duty relating to the execution of the act of Oct. 1, 1890, requiring that promotion to every grade of the Army below the rank of brigadier general shall, subject to examination, be made according to seniority in the next lower grade, is imposed upon the Secretary of War and his subordinates, so as to warrant the issuance of an injunction restraining them from taking any action to procure the nomination by the President as Deputy Quartermaster General of any officer other than the one who seeks the injunctive relief and who claims to be entitled by reason of seniority to promotion to that office. *Ray v. Garrison* (Ct. App. D. C., 1914), 42 App. D. C. 84.

More than one vacancy.—Where there are two or more offices of the same grade in a corps, each requiring a separate commission, on a vacancy occurring in such grade, the rules of promotion do not preclude the appointing power from determining to which of these offices the senior in the next grade below shall be appointed. An incumbent of one of them may be transferred by appointment to another which is vacant without prejudicing the rights of such senior, whose claim to promotion would be fully met by appointing him to either. (1882) 17 Op. Atty. Gen. 465.

Death of nominee.—It is essential to the creation of the office of major that there should be an appointment by the President in addition to a nomination to, and consent by, the Senate. Hence a commission as major of cavalry can not be lawfully issued in the name of an officer of the Army whose death occurred after he was nominated to that grade by the President, but prior to the time the nomination was confirmed by the Senate. (1911) 29 Op. Atty. Gen. 254.

Enlisted men.—The President may assign enlisted men, who have passed the examination as candidates for commissions, to vacancies that may exist in any corps or arm of the service in which they have been commissioned, notwithstanding that additional lieutenants remain in other corps unassigned. (1897) 21 Op. Atty. Gen. 491.

2280. Classification of officers.—Immediately upon the passage of this Act, and in September of 1921 and every year thereafter, the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service, and Class B, of officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to Class A, and shall be promoted according to the provisions of this Act to fill any vacancies which may occur prior to such final classification. * * * *Sec. 24b, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 773).*

2281. Class B officers.—* * * No officer shall be finally classified in Class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. * * * *Sec. 24b, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 773).*

2282. Promotion list.—For the purpose of establishing a more uniform system for the promotion of officers, based on equity, merit, and the interests of the Army as a whole, the Secretary of War shall cause to be prepared a promotion list, on which shall be carried the names of all officers of the Regular Army and Philippine Scouts below the grade of colonel, except officers of the Medical Department, chaplains, professors, the military storekeeper and certain second lieutenants of the Quartermaster Corps hereinafter specified. The names on the list shall be arranged, in general, so that the first name on the list shall be that of the officer having the longest commissioned service; the second name that of the officer having the next longest commissioned service, and so on. In computations for the purpose of determining the position of officers on the promotion list there shall be credited all active commissioned service in the Army performed while under appointment from the United States Government, whether in the Regular, provisional, or temporary forces, except service under a reserve commission while in attendance at a school or camp for the training of candidates for commission; also commissioned service in the National Guard while in active service since April 6, 1917, under a call by the President; and also commissioned service in the Marine Corps when detached for service with the Army by order of the President. In determining position on the promotion list, and relative rank, commissioned service in the Regular Army or the Philippine Scouts, if continuous to the present time, shall be counted as having begun on the date of original commission. The original promotion list shall be formed by a board of officers appointed by the Secretary of War, consisting of one colonel of each of six branches of the service in which officers are permanently commissioned under the terms of this Act, and one officer who, as a member of the personnel branch of the General Staff, has made a special study of merging the present promotion lists into a single list. The steps in the formation of the original promotion list shall be as follows:

First, officers below the grade of colonel in the Corps of Engineers, Signal Corps, Infantry, Cavalry, Field Artillery, Coast Artillery Corps, Porto Rico Regiment, and Philippine Scouts, who were originally appointed in the Regular Army or Philippine Scouts prior to April 6, 1917, shall be arranged without changing the present order of officers on the lineal lists of their own branches, but otherwise as nearly as practicable according to length of commissioned service. The following shall be omitted:

(a) Officers who, as a result of voluntary transfer, occupy positions on the lineal list other than those they would have held if their original commissions had been in their present branches;

(b) Officers of other branches appointed in the Field Artillery or the Coast Artillery Corps to fill vacancies created by the Act approved January 25, 1907;

(c) Officers appointed in the Regular Army since January 1, 1903, while serving as officers of the Porto Rico Provisional Regiment of Infantry or Philippine Scouts;

(d) Former officers of the Regular Army or Philippine Scouts who have been reappointed in these forces and who are now below normally placed officers of less commissioned service than theirs.

Officers of classes (a), (b), and (c) shall be placed on the list in the positions they would have occupied if they had remained in their original branches of the service. Officers of class (d) shall be placed on the list in the position that would normally be occupied by an officer of continuous service equal to the total active commissioned service of such officers in the Army.

Second, officers of the Judge Advocate General's Department, Quartermaster Corps, and Ordnance Department shall be placed on the list according to length of commissioned service, except those second lieutenants of the Quartermaster Corps who are found not qualified for promotion as provided in section 24b hereof.

Third, captains and lieutenants of the Regular Army and Philippine Scouts, originally appointed since April 6, 1917, shall be arranged among themselves according to commissioned service rendered prior to November 11, 1918, and shall be placed at the foot of the list as prepared to this point.

Fourth, persons to be appointed as captains or lieutenants under the provisions of section 24, hereof, shall be placed according to commissioned service rendered prior to November 11, 1918, among the officers referred to in the next preceding clause; and where such commissioned service is equal, officers now in the Regular Army shall precede persons to be appointed under the provisions of this Act, and the latter shall be arranged according to age.

Fifth, persons appointed as lieutenant colonels or majors under the provisions of section 24 hereof, shall be placed immediately below all officers of the Regular Army who, on July 1, 1920, are promoted to those grades respectively under the provisions of section 24 hereof: *Provided*, That the board charged with the preparation of the promotion list may in its discretion, assign to any such officer a position on the list higher than that to which he would otherwise be entitled, but not such as to place him above any officer of greater age, whose commissioned service commenced prior to April 6, 1917, and who would precede him on the list under the general provisions of this section.

Any former officer of the Regular Army and any retired officer who may hereafter be appointed to the active list in the manner provided by law shall be placed on the promotion list in accordance with his total active commissioned service; except that former officers appointed to field grades on July 1, 1920, under the provisions of section 24, may be placed as provided in the next preceding paragraph of this section. A reserve judge advocate appointed in the Regular Army shall be placed as provided in section 24c.

Other officers on original appointment shall be placed at the foot of the list. The place of any officer on the promotion list once established shall not thereafter be changed, except as the result of the sentence of a court-martial. *Sec. 24a, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 771-773).*

2283. Examination anterior to promotion.—That the President be, and he is hereby, authorized to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion, such an examination to be conducted at such times anterior to the accruing of the right to promotion as may be best for the interests of the service: *Provided*, That the President may waive the examination for promotion to any grade in the case of any officer who in pursuance of existing law has passed a satisfactory examination for such grade prior to the passage of this act: *And provided*, That if any officer fails to pass a satisfactory examination and is reported unfit for promotion, the officer next below him in rank, having passed said examination, shall receive the promotion: *And provided*, That should the officer fail in his physical examination, and be found incapacitated for service by reason of physical disability contracted in line of duty he shall be retired with the rank to which his seniority entitled him to be promoted; but if he

should fail for any other reason he shall be suspended from promotion for one year, when he shall be reexamined, and in case of failure on such reexamination he shall be honorably discharged with one year's pay from the Army: * * * *Sec. 3, act of Oct. 1, 1890 (26 Stat. 562).*

But see 2279, ante, and 2406, post.

Notes of Decisions.

Time of examinations.—It is not the purpose of the act to have the examinations take place so long subsequent to the occurring of the right to promotion as to be affected by intervening rights and obligations. (1892) 20 Op. Atty. Gen. 433.

Jurisdiction and powers of board.—The proceedings before the examining board, convened under this act, enacted to provide for the promotion or retirement of Army officers, which resulted in the discharge of an officer with one year's pay, by order of the President, were not had without jurisdiction, and hence without due process of law, because the board had previously made an order that such officer was then physically incapacitated for service from disability contracted in line of duty, but had a reasonable hope of recovery, and that he could not with safety proceed with his examination, since such order was merely provisional, and not a final decision, which, under the law, would have entitled him to be retired with three-quarters pay for life. *Reaves v. Alnsworth* (1911), 31 Sup. Ct. 230, 219 U. S. 296, 55 L. Ed. 225, affirming judgment (1906), 28 App. D. C. 157.

A board constituted as a board of examination for promotion can not be invested with power of a retiring board, which the law requires to be differently constituted. (1896) 21 Op. Atty. Gen. 385.

Findings of board.—The findings of a retiring board on the question of disability are equivalent to finding of board of promotion. *Cloud v. U. S.* (1907), 43 Ct. Cl. 69.

Executive orders accomplish retirement only as they apply to particular cases, and when not in conflict with law. It is the law, and not the recommendations of a retiring board, though supplemented by the approval of the President, which fixes an officer's status and consequent right to pay; and where the decision will turn exclusively upon the proper construction of a statute, an Executive order is not final, and the Court of Claims has jurisdiction. *Cloud v. U. S.* (1907), 43 Ct. Cl. 69.

Approval of findings of board.—The conclusions of a board, acting under this section, must, before being carried into execution, have the approval of the commander in chief or some one repre-

senting him. Such approval need not, however, be expressed in any formal language, but the findings must be submitted to the Secretary of War for consideration. He may approve them, either by expressly noting his approval or by promulgating the orders needed to give effect to the determination of the board. (1909) 27 Op. Atty. Gen. 193. See, also (1896) 21 Op. Atty. Gen. 385.

Reexamination.—Where an officer has been examined to determine his fitness for promotion, and he has been found to be suffering from certain physical disabilities, incapacitating him for active service, and he recovers from such disabilities, the Secretary of War may allow him a reexamination for promotion. (1896) 21 Op. Atty. Gen. 385. And where an officer was found by a board of examination to be physically qualified for promotion, but deficient in professional qualifications, which finding was approved by the board of review, and it afterwards developed that he was at the time of his examination suffering from a disability incurred in the line of duty which disqualified him for promotion, the Secretary of War may order a new physical examination. (1909) 27 Op. Atty. Gen. 193.

Certiorari.—Errors and injustice done in the proceedings before the examining board convened under the authority of this act, enacted to provide for the promotion or retirement of Army officers which resulted in the discharge of an officer with one year's pay, by an order made by the President, in the exercise of his reserved power to review the proceedings and decisions of such board, can not be corrected by the courts of certiorari. *Reaves v. Alnsworth* (1911), 31 Sup. Ct. 230, 219 U. S. 296, 55 L. Ed. 225, affirming judgment (1906), 28 App. D. C. 157.

Right to retirement.—The privilege of retirement, which an officer has "with the rank to which his seniority entitled him to be promoted," given by this section, is limited to cases where the officer failed in his physical examination only. *Steinmetz v. U. S.* (1898), 33 Ct. Cl. 404.

Rank and pay on retirement.—Where an officer examined for promotion is found incapacitated by reason of physical disability contracted in the line of his duty,

he is entitled to be retired with the rank to which his seniority entitles him to be promoted; and this finding of a retiring board is the necessary equivalent of the only finding that could have been made by the board of promotion. *Cloud v. U. S.* (1907), 43 Ct. Cl. 69.

A new commission is not necessary where an officer is entitled to be retired with the rank to which his seniority entitles him to be promoted. *Id.*

The phrase "he shall be retired with the rank to which his seniority entitles him to be promoted" is not a mandatory provision for the retirement of the disabled officer, but is for the purpose of fixing the

rank with which he should be retired. (1896) 21 Op. Atty. Gen. 385.

The word "pay" in this section refers to Army officers' pay described in the sections regulating rates of pay and service pay. *Elmer v. U. S.* (1910), 45 Ct. Cl. 90.

This section does not authorize the advancement of an officer, found physically disqualified, to the next higher grade, when his right to such advancement has accrued, and, having been so advanced, to be retired with the rank of such higher grade. (1904) 25 Op. Atty. Gen. 158; (1905), *Id.* 514. And see *Steinmetz v. U. S.* (1898), 33 Ct. Cl. 404.

2284. Examination subsequent to promotion.—That when the exigencies of the service of any officer who would be entitled to promotion upon examination require him to remain absent from any place where an examining board could be convened, the President is hereby authorized to promote such officer, subject to examination, and the examination shall take place as soon thereafter as practicable. If upon examination the officer be found disqualified for promotion, he shall, upon the approval of the proceedings by the Secretary of War, be treated in the same manner as if he had been examined prior to promotion. *Sec. 32, act of Feb. 2, 1901 (31 Stat. 756).*

But see 2279, ante.

2285. Examining boards.— * * * The selection of officers, to be appointed under the provisions of this section, under such rules and regulations as may be approved by the Secretary of War, shall be made by a board consisting of the General of the Army, three bureau chiefs and three general officers of the line, to be appointed by the Secretary of War: * * * *Sec. 24, act of June 3, 1916 (39 Stat. 183), as amended by sec. 24, act of June 4, 1920 (41 Stat. 771).*

See notes to 2279, ante.

2286. Reexamination for promotion following an increase of military strength.— * * * *Provided further,* That when by reason of increase in the arm, corps, or branch of the service in which an officer is commissioned his loss of files in lineal rank due to suspension from promotion on account of failure to pass the required examination therefor exceeds the loss he would have sustained if no such increase had occurred, he shall, if promoted upon reexamination, be advanced to the position he would have occupied in the grade to which promoted had no increase occurred: * * * *Act of Aug. 29, 1916 (39 Stat. 623), making appropriations for the support of the Army.*

But see 2280, ante, and 2406, post.

2287. Promotion of officers retarded by regimental system of promotion.—On and after the passage of this Act, every line officer on the active list below the grade of colonel who has lost in lineal rank through the system of regimental promotion in force prior to October first, eighteen hundred and ninety, may, in the discretion of the President, and subject to examination for promotion as prescribed by law, be advanced to higher grades in his arm up to and including the grade of colonel, in accordance with the rank he would have been entitled to hold had promotion been lineal throughout his arm or corps since the date of his entry into the arm or corps to which he permanently belongs:

Provided, That officers advanced to higher grades under the provisions of this Act shall be additional officers in those grades: *Provided further*, That nothing in this Act shall operate to interfere with or retard the promotion to which any officer would be entitled under existing law: *And provided further*, That the officers advanced to higher grades under this Act shall be junior to the officers who now rank them under existing law, when these officers have reached the same grade. *Act of Mar. 3, 1911 (36 Stat. 1058), making appropriations for the support of the Army.*

But see 2286, ante.

The former system of promotion, mentioned in this provision, was prescribed by R. S. 1204, superseded by acts of Oct. 1, 1890, and Feb. 2, 1901, ante, 2278, 2279, 2283, 2285.

Notes of Decisions.

Errors in promotion.—Where a lieutenant colonel, though his commission is junior in date to that of another lieutenant colonel, claims that he is entitled to the next colonelcy over the latter, by reason of errors committed in his promotion in 1847 and 1867, such errors, if any, could

not be rectified by disregarding the fact that the latter, in virtue of his present commission, is senior to the former in the line of promotion, and that his claim is therefore inadmissible. (1883), 17 Op. Atty. Gen. 611.

2288. Promotions to fill vacancies due to details to staff duty.—That each position vacated by officers of the line transferred to any department of the staff for tours of service under this Act, shall be filled by promotion in the line until the total number detailed equals the number authorized for duty in such department. Thereafter vacancies caused by details from the line to the staff shall be filled by officers returning from tours of staff duty. If under the operation of this act the number of officers returned to any particular arm of the service at any time exceeds the number authorized by law in any grade, promotions to that grade shall cease until the number has been reduced to that authorized. *Sec. 27, act of Feb. 2, 1901 (31 Stat. 755).*

The above statute is now obsolete by virtue of the act of June 4, 1920 (41 Stat. 759). The above procedure was made applicable to details to the General Staff Corps by sec. 5, act of June 3, 1916 (39 Stat. 167), to the Ordnance Department by sec. 12, act of June 3, 1916 (39 Stat. 174), and of aviation officers by sec. 18, act of June 3, 1916 (39 Stat. 174), all of which provisions were stricken out by the act of June 4, 1920, amending the national defense act.

2289. Vacant.

2290. Promotion of officers who were detailed for duty with the Isthmian Canal Commission.—That the thanks of Congress are hereby extended to the following officers of the Army and Navy of the United States who, as members of the late Isthmian Canal Commission, have rendered distinguished service in constructing the Panama Canal, to wit: Colonel George W. Goethals, chairman and chief engineer; Brigadier General William C. Gorgas, sanitary expert; Colonel H. F. Hodges, Lieutenant Colonel William L. Sibert, and Commander H. H. Rousseau. *Sec. 1, act of Mar. 4, 1915 (38 Stat. 1190).*

That the President is hereby authorized, by and with the advice and consent of the Senate, to advance in rank Colonel George W. Goethals to the grade of major general of the line, United States Army; Brigadier General William C. Gorgas to the rank of major general in the Medical Department, United States Army; Colonel H. F. Hodges and Lieutenant Colonel William L. Sibert to the grade of brigadier general of the line, United States Army; and Commander

H. H. Rousseau to the grade of rear admiral of the lower Nine, United States Navy. *Sec. 2, act of Mar. 4, 1915 (38 Stat. 1191).*

That such officers of the Army and Navy as were detailed for duty with the Isthmian Canal Commission on the Isthmus of Panama for more than three years, and who shall not have been advanced in rank by any other provision of this bill, shall be advanced one grade in rank upon retirement: *Provided*, That any officer of the Army or Navy now on the retired list with similar service shall be immediately advanced one grade in rank on the retired list of the Army or Navy. *Sec. 3, act of Mar. 4, 1915 (38 Stat. 1191).*

That the numbers in such grades provided for in sections two and four of this Act, except where vacancies occurring in any grade by the provisions of this Act can be filled by such officers in a lower grade as are entitled to the benefits of this Act, shall be temporarily increased during the time such offices may be held: * * * *Provided further*, That nothing in this Act shall operate to interfere with or retard the promotion to which any officer would be entitled under existing law: *And provided further*, That the officers advanced to higher grades under this Act shall be junior to the officers who now rank them under existing law when these officers have reached the same grade. *Sec. 5, act of Mar. 4, 1915 (38 Stat. 1191).*

Notes of Decisions.

<p>Retirement.—When an officer otherwise within the purview of the above act applies for retirement he must be retired, and the President has no discretionary authority to</p>	<p>postpone the date of retirement to such time as he may deem proper. (1915) 80 Op. Atty. Gen. 406.</p>
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2291. Promotion of officers to fill vacancies due to retirement.—When any officer in the line of promotion is retired from active service, the next officer in rank shall be promoted to his place, according to the established rules of the service; and the same rule of promotion shall be applied, successively, to the vacancies consequent upon such retirement. *R. S. 1257.*

2292. Promotion of officers to fill vacancies due to separation of the Field Artillery and Coast Artillery.—That all vacancies created or caused by this Act which can be filled by promotion of officers now in the Artillery Corps shall be filled by promotion according to seniority, subject to examination as now prescribed by law. Of the vacancies created or caused by this Act which can not be filled by promotion of officers now in the Artillery Corps, one-fifth in each branch shall be filled in each fiscal year until the total number of officers herein provided for shall have been attained. The vacancies remaining in the grade of second lieutenant shall be filled by appointment in the following order: First, of graduates of the United States Military Academy; second, of enlisted men whose fitness for advancement shall have been determined by competitive examination; third, of candidates from civil life; and all such appointments shall be made in accordance with the provisions of existing law. *Sec. 10, act of Jan. 25, 1907 (34 Stat. 863).*

The above requirements have been fulfilled.

2293. Temporary promotions to replace officers detailed to combined National Guard troops.—* * * *Provided*, That vacancies incident to the appointment of officers of the Regular Army to the positions in the forces drafted for this emergency may be filled under the provisions of section eight of the Act of

April twenty-fifth, nineteen hundred and fourteen. *Sec. 3, Joint Res. 23, July 1, 1916 (39 Stat. 340).*

2294. Temporary promotions and appointments during the World War.—
 * * * Vacancies in the grades of the Regular Army resulting from the appointment of officers thereof to higher grades in the forces other than the Regular Army herein provided for shall be filled by temporary promotions and appointments in the manner prescribed by section one hundred and fourteen of the national defense Act, approved June third, nineteen hundred and sixteen, except that such promotions and appointments may be made by the President alone when such vacancies are in grades not above that of colonel; and officers appointed under the provisions of this Act to higher grades in the forces other than the Regular Army herein provided for shall not vacate their permanent commissions or be prejudiced in their relative or lineal standing in the Regular Army. *Sec. 8, act of May 18, 1917 (40 Stat. 81), as amended by April 20, 1918 (40 Stat. 534).*

But see 2286, ante.

2295. Temporary promotions to replace officers detailed to volunteer forces.—
 That the temporary vacancies created in any grade not above that of colonel among the commissioned personnel of any arm, staff corps, or department of the Regular Army, through appointments of officers thereof to higher volunteer rank, shall be filled by temporary promotions, according to seniority in rank of officers holding commissions in the next lower grade in said arm, staff corps, or department; * * * *Provided further,* That officers temporarily promoted under the provisions of this section shall not vacate their permanent commissions, nor shall they be prejudiced in their lineal or relative standing in the Regular Army under permanent commissions, by reason of their services under temporary commissions authorized by this section. *Sec. 8, act of April 25, 1914 (38 Stat. 349).*

By sec. 1, national defense act, as amended by act of June 4, 1920 (41 Stat. 759), no volunteer forces are provided for. See 2113, ante.

2296. Temporary promotions to replace officers detailed to the Signal Corps.—
 * * * Vacancies in all grades of the Regular Army, National Army, or National Guard resulting from the temporary appointment of officers thereof to higher grades shall be filled or vacated as provided for in sections eight and nine of the Act authorizing the President to increase temporarily the military establishment of the United States and approved May eighteenth, nineteen hundred and seventeen. *Sec. 5, act of July 24, 1917 (40 Stat. 244).*

The above is emergency legislation and no longer operative.

2297. Temporary promotion of officers of the Marine Corps while detached for duty with the Army.—That commissioned officers of the Marine Corps, detached for duty with the Army under the provisions of section sixteen hundred and twenty-one, Revised Statutes, shall be eligible, in the same manner as officers of the Regular Army, for temporary promotion to higher grades in any of the forces provided by the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen: *Provided,* That officers of the Marine Corps temporarily promoted to higher grades in any of the forces of the Army under the provisions of this Act shall not thereby vacate their permanent appointments or commissions, or be prejudiced in their relative lineal standing in the Marine Corps: *Provided further,* That temporary vacancies in the Marine

Corps caused by the appointment of officers to higher grades in the Army shall be temporarily filled in the same manner as is now prescribed by law: *And provided further*, That the temporary promotions herein authorized shall continue only while such officers are detached for duty with the Army. *Act of Jan. 12, 1919 (40 Stat. 1054)*.

The above is emergency legislation and no longer operative.

2326. Promotion at time of retirement of veterans of the Civil War.— * * * *Provided*, That officers who served creditably in the regular or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, and who now hold the rank of brigadier-general on the active list of the Army, having previously held that rank for three years or more, shall, when retired from active service, have the rank and retired pay of major-general. *Act of Mar. 2, 1907 (34 Stat. 1163)*.

For special legislation to accomplish the retirement and promotion of certain officers with records of distinguished services see act of Apr. 23, 1904 (33 Stat. 264), act of Mar. 4, 1915 (38 Stat. 1084), act of Aug. 29, 1916 (39 Stat. 628).

2329. Promotion of retired officers.—That commissioned officers of the Army, Navy, and Marine Corps on the retired list whose rank has been or shall hereafter be advanced by operation of or in accordance with law shall be entitled to and shall receive commissions in accordance with such advanced rank. *Act of Mar. 4, 1911 (36 Stat. 1354)*.

* * * Hereafter any retired officer who has been or shall be detailed on active duty shall receive the rank, pay, and allowances of the grade, not above that of colonel, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed to active duty since his retirement. * * * *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 786)*.

A previous act, act of May 6, 1910 (36 Stat. 347), containing a similar provision relating to officers of the Army only, was superseded by this act.

For advancement to the grade of brigadier general of a retired colonel with distinguished service in Indian campaigns and recent wars see act of Aug. 29, 1916 (39 Stat. 627).

Notes of Decisions.

Construction and operation in general.— Congress by this act gave to retired officers of the Army detailed on active duty the longevity pay which would accrue to them by reason of their added active service after

retirement, which pay they could not theretofore receive by reason of act of Mar. 2, 1903 (32 Stat. 932). *Jonas v. U.S.* (1918), 53 Ct. Cl. 254.

2300. Lineal rank in same grade.— * * * Unless special assignment is made by the President under the provisions of the one hundred and nineteenth article of war, all officers in the active service of the United States in any grade shall take rank according to date, which, in the case of an officer of the Regular Army, is that stated in his commission or letter of appointment, and, in the case of a reserve officer or an officer of the National Guard called into the service of the United States, shall precede that on which he is placed on active duty by a period equal to the total length of active service which he may have performed in the grade in which called or any higher grade. When dates of rank are the same, precedence shall be determined by length of active commissioned service in the Army. When length of such service is the same, officers of the Regular Army shall take rank among themselves according to

their places on the promotion list, preceding reserve and National Guard officers of the same date of rank and length of service, who shall take rank among themselves according to age. * * * *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 785-786).*

2301. In fixing lineal rank, all commissioned service to be counted.—In fixing relative rank between officers of the same grade and date of appointment and commission, the time which each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, shall be taken into account. And in computing such time, no distinction shall be made between service as a commissioned officer in the Regular Army and service since the 19th day of April, 1861, in the volunteer forces, whether under appointment or commission from the President or from the governor of a State. *R. S. 1219.*

* * * In determining relative rank and increase of pay for length of service, and, in the case of officers of the Regular Army, in determining rights of retirement, active duty performed while under appointment from the United States Government, whether in the Regular, provisional, or temporary forces, shall be credited to the same extent as service under a Regular Army commission. * * * *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 785).*

Provisions relating to the rank of officers of the volunteer service during the War of the Rebellion, as affected by the date of muster into the service, and to their rights and the rights of their heirs or legal representatives to pay, emoluments, and pensions, were made by act of Feb. 24, 1897 (29 Stat. 593). But no claims were to be allowed or considered under said act after January 1, 1911, by a provision of act of Apr. 19, 1910 (36 Stat. 324), and said act of Feb. 24, 1897, is therefore omitted as no longer practically operative.

Service as a cadet at either the Military or Naval Academy is not to be counted in computing for any purpose the length of service of an officer of the Army. 1640, ante.

Notes of Decisions.

"Appointment" and "promotion."—Appointment is the selection of persons, not in the Army at the time of their selection, as officers of it, or the designation by selection of an officer already in the Army to a vacancy which is not required by law or the regulations to be filled by promotion according to seniority. Promotion is the advancement of officers already in the Army, according to seniority, to vacancies happening in the different arms of the service and according to rules prescribed by law or by regulations having the force of law. Hence the word "appointment," in this section, comprehends only the appointment of an officer on his original entry into the regular service, and does not include his appointment on promotion thereafter made. (1881) 17 Op. Atty. Gen. 196, dissenting from (1881) 17 Op. Atty. Gen. 84.

"Actually served."—The term "actually served," in this section, is used *ex industria*, and is intended to prevent any service purely constructive in its character from affecting the relation between officers of

the same date. (1881) 17 Op. Atty. Gen. 52.

Officers included.—*R. S. 1219* does not purport to regulate merely the relative rank of officers in the same department of the Army, but is intended to fix the relative rank of the various officers of different departments of the Army. (1902) 24 Op. Atty. Gen. 74.

Service as commissioned officer.—In fixing relative rank between officers of the same grade, this section does not in terms require that the officer shall be a commissioned officer, but only that he has "served as a commissioned officer." (1900) 23 Op. Atty. Gen. 232. But it has been held constructive service as a commissioned officer is not to be considered. (1881) 17 Op. Atty. Gen. 52.

Issue of commissions.—An officer of the Army may be such and be in the service of the United States without any formal commission from the President, and his grade and rank are those of a commissioned officer. (1900), 23 Op. Atty. Gen. 232.

In applying this section to the case of assistant surgeons who are entitled to rank as captains it is not necessary to issue commissions to such assistant surgeons as captains. The office to which they are already commissioned is that of assistant surgeon; and promotion therein (from the rank of first lieutenant to that of captain), consequent upon duration of service, results by mere operation of law, and does not require any action by the appointing power to effect it. (1880), 16 Op. Atty. Gen. 652.

Enrollment or mustering in.—The relative rank of officers in the military service of the United States, under this section must be determined by reference to the time of muster in, and not from the time of enrollment. (1901), 23 Op. Atty. Gen. 406, modifying (1900), 23 Op. Atty. Gen. 232.

Dates of commissions.—Previous to the enactment of this section, rank in any grade in the Army was determined by date of commission or appointment; and where commissions were of the same date, then, as between officers of the same regiment or corps, by the order of appointment. This section introduced a new rule, cumulative in its character, for determining relative rank as between officers "having the same grade and date of appointment and commission," which, as regards officers of the same regiment or corps, operates only where such officers, being of the same grade and date of appointment and commission, have (one or more) "actually served, whether continuously or at different periods, as a commissioned officer of the United States," etc. Where none of them, when appointed, had thus actually served, the former rule (i. e., order of appointment) would still be applicable in fixing their relative rank in the corps, (1882), 17 Op. Atty. Gen. 362, 402. And see (1871), 13 Op. Atty. Gen. 441; (1881), 17 Op. Atty. Gen. 10. See also (1879), 16 Op. Atty. Gen. 290, holding that where an officer, holding a commission as second lieutenant of Infantry, being on the list of unassigned officers, received and accepted a commission as second lieutenant in the Cavalry, to rank from the date of his transfer, and was thereafter promoted in ordinary course to a first lieutenantcy

therein, on being transferred to the Cavalry, was not entitled to take rank from the date of his commission in the Infantry, but from the date of his transfer, and that the action of the War Department in giving his new commission the latter date was correct, and that his commission as an Infantry officer was necessarily vacated by his acceptance of a commission in the Cavalry. (1879), 16 Op. Atty. Gen. 290.

Service in Volunteer Army.—Under sec. 17, act of July 28, 1866 (14 Stat. 334), an assistant surgeon who served as such less than three years in the Regular Army, or less than three years in the volunteer forces, did not become immediately entitled to the rank of captain, although his volunteer and regular service, when combined, may have amounted to three years. But by sec. 2, act of March 2, 1867 (14 Stat. 435), he had a right to have his volunteer service computed, and if at the date of that act this service, united with his service in the Regular Army, made three years, he would be entitled to the rank of captain. This provision, however, did not operate retrospectively, so as to affect or alter the previous relations of the officer in the service. (1882), 17 Op. Atty. Gen. 402.

Surgeons.—Where certain assistant surgeons have attained the rank of captain on the same day, but their appointments and commissions were not of the same date, their relative rank as between themselves was not determined by this section, but by the date and order of their appointment. (1882), 17 Op. Atty. Gen. 362; (1882), Id. 402. Where one was appointed to fill an original vacancy in the grade of assistant surgeon in the Army, and he accepted the appointment, having previously served as a medical officer of Volunteers for more than three years, and his appointment entitled him to the rank of captain, and he was accordingly noted as of that rank on the Army Register, his relative rank with other assistant surgeons in the Medical Corps must be determined by reference to the rank conferred by his appointment (which was that of captain) and the date thereof, and not by reference to the date of his appointment as assistant surgeon, irrespective of the rank conferred thereby. (1878), 16 Op. Atty. Gen. 56; (1878), Id. 605; (1880), Id. 632.

2302. Commissioned service in the Marine Corps to be credited in determining lineal rank.—That any second lieutenant of the United States Marine Corps who may have been appointed second lieutenant of artillery, since the second day of February, nineteen hundred and one, and prior to the passage of this Act, shall, in determining his lineal and relative rank, be entitled to the same credit for prior commissioned service as a lieutenant of volunteers appointed under the Act entitled "An Act to increase the efficiency of the permanent Military

Establishment of the United States," approved February second, nineteen hundred and one. *Act of Dec. 20, 1904* (33 Stat. 595).

Sec. 28, act of Feb. 2, 1901, mentioned in this act, which provided for credit for prior commissioned service to persons appointed first or second lieutenants in the Regular Army, who served as volunteers subsequent to Apr. 21, 1898, is set forth, 2272, ante.

2303. Constructive date of original commission of an additional officer.—

* * * *Provided*, That in applying section twenty-five of the national defense Act approved June third, nineteen hundred and sixteen, the President shall assign to officers of the Army such constructive dates of original commission, from which lengths of commissioned service shall be computed, as will preserve their rights to promotion in accordance with their relative order on the lineal lists of their arms and continue in effect losses of files occasioned by sentences of courts-martial or failures to pass required examinations for promotion, said constructive dates of original commission to be subject to change whenever a change thereof may be necessary in order to carry into effect losses of files hereafter incurred by any officer through a sentence of court-martial or a failure to pass a required examination for promotion: *Provided further*, That in determining the arm from which a detail is to be made to a vacancy in the detached officers' list, as provided in the third proviso of section twenty-five of the national defense Act approved June third, nineteen hundred and sixteen, the officer of any grade who is the senior in that grade according to the constructive dates of original commission provided for in the preceding proviso shall be considered the senior in length of commissioned service of all officers of that grade: * * * *Act of Aug. 29, 1916* (39 Stat. 623), making appropriations for the support of the Army.

But see 2262, ante.

Sec. 25, act of June 3, 1916, mentioned in this section, was stricken out by sec. 25, act of June 4, 1920 (41 Stat. 775), and 2847, post, inserted in lieu thereof.

2304. Lineal rank not changed by a staff detail with rank above that of colonel.—* * * *Provided*, That hereafter, except as otherwise provided herein, when any officer shall under the provisions of section twenty-six of the act of Congress approved February second, nineteen hundred and one, be appointed to an office with rank above that of colonel, his appointment to said office and his acceptance of the appointment shall create a vacancy in the arm, staff corps, or staff department from which he shall be appointed, and said vacancy shall be filled in the manner prescribed by existing law, but he shall retain in said arm, staff corps, or staff department, the same relative position that he would have held if he had not been appointed to said office, and he shall return to said relative position upon the expiration of his appointment to said office unless he shall be reappointed thereto; and if under the operation of this proviso the number of officers of any particular grade in any arm, staff corps, or staff department, shall at any time exceed the number authorized by law, no vacancy occurring in said grades shall be filled until after the total number of officers therein shall have been reduced below the number authorized by law; but nothing in this proviso shall be held to apply in the case of any officer who now holds a four-year appointment to an office with rank above that of colonel, and whose return to the relative position that he would have held if he had not been appointed to said office is not possible under existing law. *Sec. 5, act of Aug. 24, 1912* (37 Stat. 594).

Sec. 26, act of Feb. 2, 1901, mentioned in this provision, providing for promotions and appointments in the staff and for details from the line to the staff, is set forth 2336, 2337, post.

Sec. 27 of said act of Feb. 2, 1901, ante, 2288, which provided that positions vacated by officers of the line transferred to the staff under that act should be filled by promotions in the line and by the return of officers from the staff, was modified to some extent by the provisions of this act.

But see 2326, post.

2305. Lineal rank of general officers who served with the Isthmian Canal Commission.—* * * *And provided further*, That the general officers of the line who were appointed as such pursuant to the Act of March fourth, nineteen hundred and fifteen (Thirty-eighth Statutes at Large, page eleven hundred and ninety-one), shall take rank in their present grades over all officers hereafter appointed to like grades. *Act of Aug. 29, 1916 (39 Stat. 623), making appropriations for the support of the Army.*

For act of Mar. 4, 1915, mentioned in this section, see 564 and 2290, ante.

2306. Relative rank between officers of the Army and the Navy.—The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army, shall be as follows, lineal rank only being considered:

The Vice-Admiral shall rank with the Lieutenant-General.

Rear-admirals with major-generals.

Commodores with brigadier-generals.

Captains with colonels.

Commanders with lieutenant-colonels.

Lieutenant-commanders with majors.

Lieutenants with captains.

Masters with first lieutenants.

Ensigns with second lieutenants.

E. S. 1466.

As to vice admirals, see act of Mar. 3, 1915 (38 Stat. 941).

The word "Masters," in the last clause but one of this section, was superseded by the change of the title "master" to "lieutenant, junior grade," by a provision of sec. 1, act of Mar. 3, 1883 (22 Stat. 472).

2307. Relative rank of brigadier generals and rear admirals.—* * * *And provided*, That brigadier generals of the Army shall hereafter rank relatively with rear admirals of the lower half of the grade. * * * *Sec. 3, act of Oct. 6, 1917 (40 Stat. 411).*

2308. Relative rank of engineers of the Coast and Geodetic Survey.—* * * When serving with the Army or Navy the relative rank shall be as follows:

Hydrographic and geodetic engineers receiving \$4,000 or more shall rank with and after colonels in the Army and captains in the Navy.

Hydrographic and geodetic engineers receiving \$3,000 or more but less than \$4,000 shall rank with and after lieutenant colonels in the Army and commanders in the Navy.

Hydrographic and geodetic engineers receiving \$2,500 or more but less than \$3,000 shall rank with and after majors in the Army and lieutenant commanders in the Navy.

Hydrographic and geodetic engineers receiving \$2,000 or more but less than \$2,500 shall rank with and after captains in the Army and lieutenants in the Navy.

Junior hydrographic and geodetic engineers shall rank with and after first lieutenants in the Army and lieutenants (junior grade) in the Navy.

Aids shall rank with and after second lieutenants in the Army and ensigns in the Navy.

And nothing in this Act shall be construed to affect or alter their rates of pay and allowances when not assigned to military duty as hereinbefore mentioned.
* * * *Sec. 16, act of May 22, 1917 (40 Stat. 88).*

2309. Relative rank and command in the same grade.—That, whenever in time of war or public danger or during the emergency declared in section one of this resolution, two or more officers of the same grade are on duty in the same field, department, or command, or organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. In the absence of such assignment by the President, officers of the same grade shall rank and have precedence in the following order without regard to date of rank or commission as between officers of different classes, namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of forces drafted into the military service of the United States: * * * *Sec. 4, Joint Res. 23, July 1, 1916 (39 Stat. 340).*

But see A. W. 119, ch. 52, post.

2310. Rank and precedence of officers of the Regular Army holding commissions in drafted forces.—* * * *Provided*, That officers of the Regular Army holding commissions in forces drafted into the service of the United States shall rank and have precedence under said commissions as if they were commissioned in the Regular Army; but the rank of officers of the Regular Army under their commissions in the forces drafted into the service of the United States shall not for the purpose of this resolution be held to antedate muster or draft into the service of the United States. *Sec. 4, Joint Res. 23, July 1, 1916 (39 Stat. 340).*

But see A. W. 119, ch. 52, post.

2311. Limitation on advanced rank.—Hereafter no detail, rating, or assignment of an officer shall carry advanced rank, except as otherwise specifically provided herein: * * * *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 785).*

2312. Transfer without loss of rank.—Upon his own application any officer may be transferred to another branch without loss of rank or change of place on the promotion list. *Sec. 24d, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 774).*

Notes of Decisions.

Exchange of officers.—Lieutenants in the Artillery and Marine Corps may be exchanged, with their own assent, where the ranks of other officers will not be interfered with or prejudiced; but such exchanges can be effected only by the action of the

appointing power of the President, by and with the advice and consent of the Senate, and will not be made unless the good of the service requires it. (1830) 2 Op. Atty. Gen. 355.

2313. Brevet rank conferred in time of war.—The President, by and with the advice and consent of the Senate, may, in time of war, confer commissions by brevet upon commissioned officers of the Army, for distinguished conduct and public service in presence of the enemy. *R. S. 1209.*

For statute providing for brevets for officers of the Regular Army for service in Volunteer forces during the "late war," see act of Feb. 18, 1897 (29 Stat. 530).

Notes of Decisions.

Construction of section in general.—This section is not mandatory. It merely authorizes the President to confer brevet rank in certain cases. Such cases are within his sole discretion to say whether the gallant actions, meritorious conduct, and the service in one grade of 10 years, have been sufficiently important to deserve the mark of distinction. (1828) 2 Op. Atty. Gen. 71.

See, also, notes to 2319, post.

Distinguished conduct, etc.—Where nominations of Army officers for promotion by brevet had been pending before the Senate prior to the date of the enactment of this section (act of Mar. 1, 1869, 15 Stat. 281),

but were not confirmed by that body until that date, if the officers were not nominated by reason of "distinguished conduct and public service in the presence of the enemy," they could not be commissioned. (1869) 13 Op. Atty. Gen. 31.

Indian service.—A nomination for brevet promotion, by reason of meritorious service in engagements with the Indians, was within the statute and consistently with its provisions commissions might be issued to any of the officers referred to who might have been thus nominated. And such promotion is to be viewed as conferred "in time of war." (1869) 13 Op. Atty. Gen. 31.

2314. Brevet rank conferred for service against Indians.—That the President of the United States be, and he is hereby, authorized and empowered, at his discretion, to nominate, and by and with the advice and consent of the Senate, to appoint to brevet rank all officers of the United States Army, now on the active or retired list, who by their department commander, and with the concurrence of the commanding general of the Army, have been or may be recommended for gallant service in action against hostile Indians since January first, eighteen hundred and sixty-seven. *Sec. 1, act of Feb. 27, 1890 (26 Stat. 15).*

That such brevet commissions as may be issued under the provisions of this act shall bear date only from the passage of this act: *Provided, however, That the date of the particular heroic act for which the officer is promoted shall appear in his commission. Sec. 2, act of Feb. 27, 1890 (26 Stat. 15).*

2315. Date of a brevet commission.—Brevet commissions shall bear date from the particular action or service for which the officers were brevetted. *R. S. 1210.*

2316. Uniform of a brevetted officer.—No officer shall be entitled, on account of having been brevetted, to wear, while on duty, any uniform other than that of his actual rank; * * * *R. S. 1212.*

2317. Title of a brevetted officer.—* * * and no officer shall be addressed in orders or official communications by any title other than that of his actual rank. *R. S. 1212.*

2318. Brevet rank honorary.—That brevet rank shall be considered strictly honorary, and shall confer no privilege of precedence or command not already provided for in the statutes which embody the rules and articles governing the Army of the United States. *Sec. 3, act of Feb. 27, 1890 (26 Stat. 14).*

2319. Command by a brevetted officer.—Officers may be assigned to duty or command according to their brevet rank by special assignment of the President; and brevet rank shall not entitle an officer to precedence or command except when so assigned. *R. S. 1211.*

Notes of Decisions.

Time of taking effect of brevet rank.—Brevet rank takes effect whenever by special assignment the brevet officer is invested with a separate command, comprising troops of different corps at a particular post. (1823) 1 Op. Atty. Gen. 604.

Where a brevet commission in the Army is conferred upon a party, to take rank from a prior date, the pay and emoluments of the rank conferred follow as an incident from this date, whenever the party has rendered services according to that

rank. U. S. v. Vinton (1836), Fed. Cas. No. 16,624.

Precedence, command, and pay.—Where an Army officer is placed on duty according to his brevet rank by special assignment of the President, he is, while thus assigned, entitled to precedence and command according to his brevet commission, even over an officer holding a full commission of the same rank as the brevet, but of

junior date. (1881) 17 Op. Atty. Gen. 39. Brevet rank does not entitle the holder to corresponding pay or command, except under special circumstances defined by law. When an officer holding rank by brevet receives a regular commission of the same grade, he is said to be promoted. U. S. v. Hunt (1871), 14 Wall. 550, 552, 20 L. Ed. 739.

2320. Command according to brevet rank during hostilities.— * * * *And provided further*, That officers of the Army shall only be assigned to duty or command according to their brevet rank when actually engaged in hostilities: * * * *Act of Mar. 3, 1883 (22 Stat. 457).*

2321. Command by a medical officer.—Officers of the Medical Department of the Army shall not be entitled, in virtue of their rank, to command in the line or in other staff corps. *R. S. 1169.*

2322. General officers of the line and staff.—Officers commissioned to and holding in the Army the office of a general officer shall hereafter be known as general officers of the line. Officers commissioned to and holding in the Army an office other than that of a general officer, but to which the rank of a general officer is attached, shall be known as general officers of the staff. * * * *Sec. 4, act of June 3, 1916 (39 Stat. 167), as amended by sec. 4, act of June 4, 1920 (41 Stat. 760).*

2323. Number of general officers of the line.— * * * There shall be one general, as now authorized by law, until a vacancy occurs in that office, after which it shall cease to exist. On and after July 1, 1920, there shall be twenty-one major generals and forty-six brigadier generals of the line; * * * *Sec. 4, act of June 3, 1916 (39 Stat. 167), as amended by sec. 4, act of June 4, 1920 (41 Stat. 760).*

See notes to 2327 and 2328, post.

2324. Appointment of general officers.— * * * *Provided*, That major generals of the line shall be appointed from officers of the grade of brigadier general of the line, and brigadier generals of the line shall be appointed from officers of the grade of colonel of the line whose names are borne on an eligible list prepared annually by a board of not less than five general officers of the line, not below the grade of major general: *Provided further*, That the first board convened after the passage of this Act may place upon such eligible list any officer of the line of not less than twenty-two years' commissioned service. * * * *Sec. 4, act of June 3, 1916 (39 Stat. 167), as amended by sec. 4, act of June 4, 1920 (41 Stat. 760).*

2325. Temporary general officers appointed for the world war.—That the President, by and with the advice and consent of the Senate, is authorized to appoint for the period of the existing emergency such general officers of appropriate grades as may be necessary for duty with brigades, divisions, and higher units in which the forces provided for herein may be organized by the President, and general officers of appropriate grade for the several Coast Artillery districts. In so far as such appointments may be made from any of the forces herein provided for, the appointees may be selected irrespective of the grades held by them in such forces. * * * *Sec. 8, act of May 18, 1917 (40 Stat. 81).*

That section eight of the act entitled "An act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, shall be held and construed to authorize the President, in accordance with the provisions of said act and for the period of the existing emergency only, to appoint as generals the Chief of Staff and the commander of the United States forces in France; and as lieutenant general each commander of an army or army corps organized as authorized by existing law: * * * *Sec. 3, act of Oct. 6, 1917 (40 Stat. 410).*

The above is emergency legislation and no longer operative.

2326. Chiefs of branches and assistants.— * * * Except as otherwise herein prescribed, chiefs and assistants to the chiefs of the several branches shall hereafter be appointed by the President, by and with the advice and consent of the Senate, for a period of four years, and such appointments shall not create vacancies. Appointment as chief of any branch shall be made from among officers commissioned in grades not below that of colonel, and as assistant from among officers of not less than fifteen years' commissioned service, who have demonstrated by actual and extended service in such branch or on similar duty that they are qualified for such appointment: *Provided*, That the chiefs of the several branches shall make recommendations to the Secretary of War for the appointment of their assistants: *Provided further*, That in making the first appointment to any such office created by this Act, the chief of a branch may be selected from among officers of not less than twenty-two years' commissioned service. * * * *Sec. 4c, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920 (41 Stat. 762).*

2327. The office of Lieutenant General.— * * * *Provided*, That when the office of Lieutenant-General shall become vacant it shall not thereafter be filled, but said office shall cease and determine: *Provided further*, That nothing in this provision shall affect the retired list. *Act of Mar. 2, 1907 (34 Stat. 1166).*

The grade of Lieutenant General was first established by the act of May 28, 1796 (1 Stat. 558); it was abolished, however, by sec. 9 of the act of Mar. 3, 1796 (*id.* 732), and the command of the forces authorized to be raised, in contemplation of war with France, was vested in the "General of the Armies of the United States" authorized by that statute. The grade was revived by joint resolution No. 9 of Feb. 15, 1865 (10 *id.* 723), and the rank was conferred by brevet on Maj. Gen. Winfield Scott; the office thus created ceased to exist at the death of that officer on May 29, 1866. The grade was again revived by the act of Feb. 29, 1864 (13 *id.* 11), and conferred upon Maj. Gen. Ulysses S. Grant, and the office was recognized and continued by sec. 9 of the act of July 28, 1866 (14 *id.* 333), but was to cease to exist upon the occurrence of a vacancy, under the restriction imposed by sec. 6 of the act of July 15, 1870 (16 *id.* 318). The office was vacated and merged in that of General of the Army upon the promotion of Lieut. Gen. Sheridan to that grade, under the authority conferred by the act of June 1, 1888 (25 *id.* 165). It was revived a third time by joint resolution No. 9 of Feb. 5, 1895 (28 *id.* 968), and was conferred, subject to the restriction therein contained, upon Maj. Gen. John M. Schofield, and the office continues to exist as a grade of military rank on the retired list. The rank, pay, and allowances of Lieutenant general were conferred upon "the senior major general of the line commanding the Army" by sec. 2 of the act of June 6, 1900 (31 *id.* 655); the office was revived as a grade of military rank by sec. 1, act of Feb. 2, 1901 (31 Stat. 748), but was omitted from the composition of the Regular Army in sec. 2, act of June 3, 1916, and by sec. 4 of the act of June 4, 1920 (41 *id.* 760).

2328. Office of General of the Armies of the United States.—That the office of General of the Armies of the United States is hereby revived, and the President is hereby authorized, in his discretion and by and with the advice and consent of the Senate, to appoint to said office a general officer of the Army who, on foreign soil and during the recent war, has been especially distin-

guished in the higher command of military forces of the United States; and the officer appointed under the foregoing authorization shall have the pay prescribed by section 24 of the Act of Congress approved July 15, 1870, and such allowances as the President shall deem appropriate; and any provision of existing law that would enable any other officer of the Army to take rank and precedence over said officer is hereby repealed: *Provided*, That no more than one appointment to office shall be made under the terms of this Act. *Act of Sept. 3, 1919 (41 Stat. 283).*

See 2323, ante, providing for "one general, as now authorized by law."

The grade of "General of the Armies of the United States" was created by sec. 9 of the act of Mar. 3, 1799 (1 Stat. 752). The office, though not expressly referred to in any of the acts for the reduction or disbandment of the forces raised in contemplation of war with France, ceased to exist in 1802, not having been mentioned in the act of Mar. 16, 1802 (2 id. 132), which determined the military peace establishment. The grade was revived under the title of "General of the Army of the United States," by the act of July 25, 1866 (14 id. 223), and was conferred upon Lieut. Gen. Grant; and was recognized and continued by sec. 9 of the act of July 28, 1866 (id. 333). Sec. 6 of the act of July 15, 1870 (16 id. 318), contained the requirement, however, that "the offices of General and Lieutenant-General shall continue until a vacancy shall exist in the same, and no longer, and when such vacancy shall occur in either of said offices immediately thereupon all laws and parts of laws creating said office shall become inoperative, and shall, by virtue of this act, from thenceforward be held to be repealed." The office ceased to exist, as a grade of military rank, at the death of Gen. W. T. Sherman on Feb. 14, 1891. The act of Mar. 3, 1885 (23 id. 434), authorized the appointment of a "General of the Army on the Retired List," which was conferred upon Gen. Ulysses S. Grant, and expired on the death of that officer on July 23, 1885. By the act of June 1, 1888 (25 id. 165), the grade of Lieutenant general was discontinued and merged in that of General of the Army, which was conferred upon Lieut. Gen. P. H. Sheridan, and ceased to exist at the death of that officer on Aug. 5, 1888.

The act of July 15, 1870, was incorporated into R. S. 1261, ante, 1627. Joint Resolution 15, Sept. 29, 1919 (41 Stat. 291), provided "that the thanks of the American people and of the Congress of the United States are due, and are hereby tendered, to General John J. Pershing for his highly distinguished services as commander in chief of the American Expeditionary Forces in Europe and to the officers and men under his command for their unwavering devotion and heroic valor throughout the war."

2329. Aids for the General.—The General may select from the Army such number of aids, not exceeding six, as he may deem necessary, who shall have, while serving on his staff, the rank of colonel of cavalry. *R. S. 1096.*

2330. Aids for a Lieutenant-general.—The Lieutenant-General may select from the Army two aids and one military secretary, who have the rank of lieutenant-colonel of cavalry while serving on his staff. *R. S. 1097.*

Section one thousand and ninety-seven is amended by inserting, in the second line, after the word "who", the word "shall". *Act of Feb. 27, 1877 (19 Stat. 241), amending R. S. 1097.*

2331. Aids for major-generals and brigadier-generals.—Each major-general shall have three aids, who may be selected by him from captains or lieutenants of the Army, and each brigadier-general shall have two aids, who may be selected by him from lieutenants of the Army. *R. S. 1098.*

Notes of Decisions.

Duties of aids.—The duties of aids, whether in the Army or Navy, are personal to commanding officers. *Crosley v. U. S. (1903), 38 Ct. Cl. 82.*

2332. Personal staffs not allowed for officers of the General Staff Corps.—
* * * Acts and parts of acts authorizing aides-de-camp and military secretaries shall not apply to general officers of the General Staff Corps. *Sec. 4, act of Feb. 14, 1903 (32 Stat. 831).*

2333. Cavalry officers available for staff duty.— * * * Of the officers herein provided, the captains and lieutenants not required for duty with the troops shall be available for detail as regimental and squadron staff officers and such other details as may be authorized by law or regulations. * * * *Sec 2, act of Feb. 2, 1901 (31 Stat. 748).*

2334. Infantry officers available for staff duty.— * * * Of the officers herein provided, the captains and lieutenants not required for duty with the companies shall be available for detail as regimental and battalion staff officers and such other details as may be authorized by law or regulations. * * * *Sec. 10, act of Feb. 2, 1901 (31 Stat. 750).*

For detail from line to staff, eligibility of officers, service with troops as staff officer deemed duty with line, see 2350, post.

Notes of Decisions.

<p>Vacancies in quartermaster's department.—Promotions to fill vacancies in the Quartermaster's Department under sec. 13,</p>	<p>act of July 28, 1866, see (1872) 14 Op. Atty. Gen. 2.</p>
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2335. Assignment of officers to staff corps.— * * * All officers of the General Staff Corps, Inspector General's Department, Bureau of Insular Affairs and Militia Bureau shall be obtained by detail from officers of corresponding grades in other branches. Other officers may be either detailed, or with their own consent, be permanently commissioned, in the branches to which they are assigned for duty. *Sec. 4, act of June 3, 1916 (39 Stat. 167), as amended by sec. 4, act of June 4, 1920 (41 Stat. 760-761).*

For portion omitted above see 2260, ante.

2336. Details from the line to fill vacancies in the staff corps and departments.—That so long as there remain any officers holding permanent appointments in the Adjutant-General's Department, the Inspector-General's Department, the Quartermaster's Department, the Subsistence Department, the Pay Department, the Ordnance Department, and the Signal Corps, including those appointed to original vacancies in the grades of captain and first lieutenant under the provisions of sections sixteen, seventeen, twenty-one, and twenty-four of this Act, they shall be promoted according to seniority in the several grades, as now provided by law, and nothing herein contained shall be deemed to apply to vacancies which can be filled by such promotions or to the periods for which the officers so promoted shall hold their appointments, and when any vacancy, except that of the chief of the department or corps, shall occur which can not be filled by promotion as provided in this section, it shall be filled by detail from the line of the Army, and no more permanent appointments shall be made in those departments or corps after the original vacancies created by this act shall have been filled. Such details shall be made from the grade in which the vacancies exist, under such system of examination as the President may from time to time prescribe. * * * *Sec. 26, act of Feb. 2, 1901 (31 Stat. 755).*

But see 2260 and 2335, ante, and 2353, post.

Notes of Decisions.

<p>The only vacancy which the President is authorized to fill, under this section, is an original vacancy; and after such vacancy has been filled there is no longer</p>	<p>an original vacancy in that particular place, and any subsequent vacancy must be filled by promotion or by detail. So, where a captain in a regiment of Volun-</p>
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teer Infantry authorized to be raised by act of Mar. 2, 1899 (30 Stat. 977), was appointed on June 14, 1901, a quartermaster in the Army, with the rank of captain, to rank as such from Feb. 2, 1901, and accepted the appointment on June 27, 1901, and resigned on July 8th following, and a captain of Cavalry in the line of the Army was detailed in the Quar-

termaster's Department to fill the vacancy thus created, such detail being made under authority conferred by this section, the vacancy thus created was not an original vacancy, which could be filled by the appointment of a person similarly qualified, but must be filled by detail. (1901) 23 Op. Atty. Gen. 574.

2337. Term of detail to staff corps and departments.— * * * All officers so detailed shall serve for a period of four years, at the expiration of which time they shall return to duty with the line, and officers below the rank of lieutenant-colonel shall not again be eligible for selection in any staff department until they shall have served two years with the line. * * * *Sec. 26, act of Feb. 2, 1901 (31 Stat. 755).*

* * * In time of peace no officer of the line shall be or remain detailed as a member of the General Staff Corps unless he has served for two of the next preceding six years in actual command of troops of one or more of the combatant arms; and in time of peace every officer serving in a grade below that of brigadier general shall perform duty with troops of one or more of the combatant arms for at least one year in every period of five consecutive years, except that officers of less than one year's commissioned service in the Regular Army may be detailed as students at service schools: *Provided*, That an officer commissioned in a staff corps shall not be or remain detailed as a member of the General Staff Corps unless he has served for one of the next preceding five years with troops of one or more of the combatant arms. In the administration of this provision, all duty performed between April 6, 1917, and July 1, 1920, inclusive, or as a student at service schools, other than those of the noncombatant branches, at any time, shall be regarded as satisfying the requirements of service with combatant arms. * * * *Sec. 4c, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920 (41 Stat. 762).*

See 2351, post.

2338. Tour of staff duty reduced by retirement.— * * * *Provided*, That no officer hereafter detailed or appointed under the provisions of section twenty-six of the Act of February second, nineteen hundred and one, who has less than four years to serve from the date of his detail or appointment to the date of his retirement shall serve under such detail or appointment or be paid as if on the active list beyond the date of his retirement. *Act of June 30, 1902 (32 Stat. 509).*

For sec. 26, act of Feb. 2, 1901, mentioned above, see 2336, 2337, ante.
See, also, 2288, ante.

2339. Successive details to a staff corps or department with reduced rank.— * * * *Provided further*, That hereafter whenever the President shall deem it inadvisable to reappoint, at the end of a four-year term, any officer who, under the provisions of section twenty-six of the Act approved February second, nineteen hundred and one, or Acts amendatory thereof, has been appointed for such a term, in any staff corps or staff department, to an office with rank above that of colonel, but whose commission in the lower grade held by him in said staff corps or staff department at the time of his appointment under said Act to an office of higher grade has been vacated, the President may, by and with the advice and consent of the Senate, appoint said officer to be an officer of the

grade that he would have held, and to occupy the relative position that he would have occupied, in said staff corps or staff department if he had not been appointed to said office with rank above that of colonel; and if under the operation of this proviso the number of officers of any particular grade in any staff corps or staff department shall at any time exceed the number authorized by law other than this Act, no vacancy occurring in said grade shall be filled until after the total number of officers therein shall have been reduced below the number so authorized: * * * *Act of Apr. 27, 1914 (38 Stat. 356).*

For sec. 26, act of Feb. 2, 1901, mentioned above, see 2336, ante.
But see 2326, ante.

2340. Selection of a chief of a staff corps from officers detailed thereto.—*Provided*, That hereafter whenever the number of officers holding permanent appointments in any staff corps or staff department of the Army, except the Quartermaster Corps, shall have been reduced below four and a vacancy shall occur in an office above the grade of colonel in said corps or department, any officer of the Army with rank above that of major who shall have served creditably for not less than four years by detail in said corps or department under the provisions of section twenty-six of the Act of Congress approved February second, nineteen hundred and one, shall, in addition to officers otherwise eligible, be eligible for appointment to fill said vacancy: * * * *Act of Apr. 27, 1914 (38 Stat. 356).*

This is apparently special legislation; probably the requirements have been fulfilled.

2341. Appointment of chief of a staff corps or department from Army at large.—* * * That when vacancies shall occur in the position of chief of any staff corps or department the President may appoint to such vacancies, by and with the advice and consent of the Senate, officers of the Army at large not below the rank of lieutenant-colonel, and who shall hold office for terms of four years. When a vacancy in the position of chief of any staff corps or department is filled by the appointment of an officer below the rank now provided by law for said office, and chief shall, while so serving, have the same rank, pay, and allowances now provided for the chief of such corps or department. * * * *Provided*, That so long as there remain in service officers of any staff corps or department holding permanent appointments, the chief of such staff corps or department shall be selected from the offices so remaining therein. *Sec. 26, act of Feb. 2, 1901 (31 Stat. 755).*

The chiefs of each of several staff departments and corps were required to be appointed by selection from the corps to which they belong, by R. S. 1193. This provision was superseded by this section, as to the chiefs of all such departments except the chief of the Corps of Engineers, who was to be appointed, by sec. 22 of this act, "as now provided by law," 596, ante.

But see 2326, ante.

2342. Rank of chiefs of staff and departments.—* * * And, hereafter, the chief of any existing staff corps, department, or bureau, except as is otherwise provided for the Chief of Staff, shall have the rank, pay, and allowances of major general. *Sec. 3, act of Oct. 6, 1917 (40 Stat. 411).*

The act of June 4, 1920, amending the national defense act, apparently nullifies the above; see 496, 502, 699, ante, and 2385, post.

2343. Chiefs of staff corps and departments appointed major generals of the line.—That hereafter the President be, and he is hereby, authorized, by and

with the advice and consent of the Senate, to appoint any chief of a staff corps, department, or bureau of the Army who has had forty or more years of service in the Army, a major general of the line of the Army. The officers so appointed shall not exceed two, and shall be extra numbers in the list of major generals of the line. *Act of July 9, 1918 (40 Stat. 853).*

This is apparently special legislation; probably the requirements have been fulfilled.

2344. Chief of Coast Artillery.— * * * When a vacancy occurs in the office of the Chief of Artillery or Chief of Coast Artillery the President may appoint to such vacancy, by and with the advice and consent of the Senate, an officer selected from the coast artillery, who shall serve for a period of four years unless reappointed for further periods of four years; and any officer who shall hereafter serve as Chief of Artillery or Chief of Coast Artillery shall, when retired, be retired with the rank, pay, and allowances authorized by law for a brigadier-general on the retired list. The position vacated by an officer appointed Chief of Artillery or Chief of Coast Artillery shall be filled by promotion in that arm according to existing law, but the officer thus appointed shall continue in the same lineal position in his arm which he would have held if he had not been so appointed, and shall be an additional number in the grade from which he was appointed or to which he may be promoted: *Provided*, That there shall not be at any time in the coast artillery more than one additional officer by reason of the appointment of a Chief of Artillery or Chief of Coast Artillery and the relief of an officer from such duty. *Sec. 2, act of Jan. 25, 1917 (34 Stat. 861).*

But see 2326, ante, and 2425, post.

The Chief of Artillery (Chief of Coast Artillery) was made an additional member of the General Staff by a provision of the act establishing the General Staff Corps, sec. 5, act of Feb. 14, 1908 (32 Stat. 831), and continued as such by provisions in this section (not here set forth) and in sec. 5, act of June 3, 1916 (39 Stat. 168), but not included as a member of the General Staff Corps by sec. 5, act of June 4, 1920, ante 507.

2345. Chief of Coast Artillery to have rank of major general.— * * * *Provided*, That hereafter the Chief of Coast Artillery shall have the rank, pay, and allowances of a major general. *Act of July 6, 1916 (39 Stat. 349).*

The Chief of Coast Artillery was given the rank, pay, and allowances of a brigadier general by a provision in sec. 5, act of Jan. 25, 1907, and similar provision in sec. 20, act of June 3, 1916, which provision was in turn superseded by above, and 2137, ante.

2346. Acting chief of bureau.—Section eleven hundred and thirty-two is amended by adding at the end of the section the following:

"* * * During the absence of the Quartermaster-General, or the chief of any military bureau of the War Department, the President is authorized to empower some officer of the department or corps whose chief is absent to take charge thereof, and to perform the duties of Quartermaster-General, or chief of the department or corps, as the case may be, during such absence." *Act of Feb. 27, 1877 (19 Stat. 242), amending R. S. 1132.*

This section, as enacted in the Revised Statutes, prescribed the organization of the Quartermaster's Department authorized by R. S. 1094.

It contains the substance of sec. 5 of the act of July 4, 1836 (5 Stat. 117), which was passed in order to enable Q. M. Gen. Thos. S. Jesup to exercise command of the troops engaged in the prosecution of the Florida war. Gen. Jesup served under this assignment from May 19, 1836, to July 7, 1838, when he resumed the performance of his duties as Quartermaster-General in the War Department. It was superseded by the different provisions relating to the same subject of act of Mar. 3, 1875 (18 Stat. 338); but thereafter it was amended by sec. 1, act of Feb. 27, 1877 (19 Stat. 242), by the addition of a provision that all appointments in the department should be made from the Army,

and of the further provision set forth here. Appointments from civil life to fill vacancies in the department were authorized by a provision of act of Mar. 3, 1883 (22 Stat. 457), thus superseding the first provision added by the amendment. There and subsequent provisions relating to the department were superseded by sec. 16, act of Feb. 2, 1901 (31 Stat. 751), by secs. 3, 4, act of Aug. 24, 1912, ante, 703, 704, 707, 711, 718-720, 710, and by sec. 9, act of June 3, 1916 (39 Stat. 170), which was stricken out by sec. 9, act of June 4, 1920 (41 Stat. 766).

2347. Detached officer's list.—All officers and enlisted men authorized by law and not assigned to duty with any branch or bureau herein provided for shall be carried on the Detached Officers' List and Detached Enlisted Men's List, respectively. *Sec. 25, act of June 3, 1916 (39 Stat. 183), as amended by sec. 25, act of June 4, 1920 (41 Stat. 775).*

2348. Detached duty during the war with Germany regarded as service with troops.—That, after the termination of the emergency incident to the war with Germany and Austria-Hungary, in the construction of any law relating to detached service of the officers of the Regular Army, all service performed by such officers during the said emergency shall be regarded as service with troops or organizations thereof. *Act of Jan. 17, 1920 (41 Stat. 394).*

See 2337, ante.

2349. Detached duty alternated with duty with troops.—*Provided*, That hereafter in time of peace whenever any officer holding a permanent commission in the line of the Army with rank below that of major shall not have been actually present for duty for at least two of the last preceding six years with a troop, battery, or company, of that branch of the Army in which he shall hold said commission, such officer shall not be detached nor permitted to remain detached from such troop, battery, or company, for duty of any kind; and all pay and allowances shall be forfeited by any superior for any period during which, by his order, or his permission, or by reason of his failure or neglect to issue or cause to be issued the proper order or instructions at the proper time, any officer shall be detached or permitted to remain detached in violation of any of the terms of this proviso; but nothing in this proviso shall be held to apply in the case of any officer for such period as shall be actually necessary for him, after having been relieved from detached service, to join the troop, battery, or company, to which he shall belong in that branch in which he shall hold a permanent commission, nor shall anything in this proviso be held to apply to the detachment or detail of officers for duty in the Judge Advocate General's Department or in the Ordnance Department, or in connection with the construction of the Panama Canal until after such canal shall have been formally opened, or in the Philippine Constabulary until the first day of January, nineteen hundred and fourteen, or to any officer detailed, or who may be hereafter detailed, for aviation duty. And hereafter no officer holding a permanent commission in the Army with rank below that of major shall be detailed as assistant to the Chief of the Bureau of Insular Affairs with rank of colonel, or as commanding officer of the Porto Rico Regiment of Infantry, or as chief or assistant chief (Director or Assistant Director) of the Philippine Constabulary, and no other officers of the Army shall hereafter be detailed for duty with the said Constabulary except as specifically provided by law. *Act of Aug. 24, 1912 (37 Stat. 571).*

That in the "Act making appropriation for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes," there be substituted for the word "hereafter" * * * the words:

on and after December fifteenth, nineteen hundred and twelve. *Joint Res. 53, Aug. 2, 1912 (37 Stat. 645).*

This is the so-called "Manchu law."

So much of this section as relates to the detachment or detail of officers for duty in the Judge Advocate General's Department was made to apply only to the acting judge advocates authorized by law by a provision of sec. 8, act of June 3, 1916, which was stricken out by sec. 8, act of June 4, 1920, and 547, ante, was inserted in lieu thereof.

But see 2337, ante, and 2353, post.

2350. Duty on regimental, battalion or squadron staffs considered duty with troops.—* * * *Provided*, That hereafter, in determining the eligibility, under the provisions of the Act of Congress approved August twenty-fourth, nineteen hundred and twelve, of troop, battery, or company officers for detail as officers of the various staff corps and departments of the Army, except the General Staff Corps, service actually performed by any such officer with troops prior to December fifteenth, nineteen hundred and twelve, as a regimental, battalion, or squadron staff officer, shall be deemed to have been duty with a battery, company, or troop: * * * *Act of Mar. 2, 1913 (37 Stat. 706).*

The provisions for detail of officers to staff corps and departments of sec. 5, act of Aug. 24, 1912, ante, 2304, mentioned in this proviso, relate to such details provided for by sec. 26, act of Feb. 2, 1901, ante, 2330.

But see 2337, ante.

2351. Detached duty for field officers.—* * * *And provided further*, That after September first, nineteen hundred and fourteen, in time of peace, whenever any officer holding a permanent commission in the line of the Army, with rank of colonel, lieutenant colonel, or major, shall not have been actually present for duty for at least two years of the last preceding six years with a command composed of not less than two troops, batteries, or companies of that branch of the Army in which he shall hold said commission, such officer shall not be detached nor permitted to remain detached from such command for duty of any kind except as hereinafter specifically provided; and all pay and allowances shall be forfeited by any superior for any period during which, by his order or his permission, or by reason of his failure or neglect to issue or cause to be issued the proper order or instructions at the proper time, any officer shall be detached or permitted to remain detached in violation of any of the terms of this Act; but nothing in this Act shall be held to apply in the case of any officer for such period as shall be actually necessary for him, after having been relieved from detached service, to join the organization or command to which he shall belong in that branch in which he shall hold a permanent commission; nor shall anything in this Act be held to apply to the detachment or detail of officers for duty in connection with the construction of the Panama Canal until after such canal shall have been formally opened, or in connection with the Alaska Road Commission or the Alaska Railroad or the Bureau of Insular Affairs; and nothing in this Act shall prevent the redetail of officers above the grade of major to fill vacancies in the various staff corps and departments as provided for by section twenty-six of the Act of Congress approved February second, nineteen hundred and one: *Provided further*, That whenever the service record of any field officer is to be ascertained for the purposes of this Act, all duty actually performed by him during the last preceding six years, in a grade below that of major, in connection with any statutory organization of that branch of the Army in which he shall hold a permanent commission, or as a staff officer of any coast-defense or coast-artillery district, shall be credited to him as actual presence for duty with a command composed as

hereinbefore prescribed: *And provided further*, That temporary duty of any kind hereafter performed with United States troops in the field for a period or periods the aggregate of which shall not exceed sixty days in any one calendar year, and duty hereafter performed in command of United States army mine planter by an officer assigned to a company from which this detachment is drawn, and duty hereafter performed in command of a machine-gun platoon or a machine-gun unit, by any officer who, before assignment to such duty, shall have been regularly assigned to, and shall have entered upon duty with, an organization or a command the detachment of certain officers from which is prohibited by the Act of Congress approved August twenty-fourth, nineteen hundred and twelve, or by this Act, shall, for the purposes of said Acts, hereafter be counted as actual presence for duty with such organization or command. *Act of Apr. 27, 1914 (38 Stat. 357).*

The pertinent portion of sec. 26, act of Feb. 2, 1901, mentioned above, is set forth 2336, ante.

The pertinent portion of sec. 1, act of Aug. 24, 1912, also mentioned above, is set forth 2349 ante.

But see 2260, 2337, ante.

2352. Restrictions on details from the Regular Army suspended during the World War.—That all existing restrictions upon the detail, detachment, and employment of officers and enlisted men of the Regular Army are hereby suspended for the period of the present emergency. *Sec. 11, act of May 18, 1917 (40 Stat. 82).*

The above is emergency legislation and no longer operative.

2353. Repeal of laws restricting details and assignments.— * * * Existing laws in so far as they restrict the detail or assignment of officers are hereby repealed. * * * *Sec. 4c, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920 (41 Stat. 762).*

2354. Details of field artillery officers for instruction.— * * * *Provided*, That officers in the grade of second lieutenant in the Field Artillery may be assigned, for the period of one year, to batteries stationed at the School of Fire for Field Artillery at Fort Sill, Oklahoma, for the purpose of pursuing courses of practical instruction in field artillery. *Act of May 12, 1917 (40 Stat. 41), making appropriations for the support of the Army: United States service schools.*

2355. Details as students and observers.— * * * The Secretary of War is hereby authorized, in his discretion, to detail not to exceed 2 per centum of the commissioned officers of the Regular Army in any fiscal year as students at such technical, professional, and other educational institutions, or as students, observers, or investigators at such industrial plants, hospitals and other places, as shall be best suited to enable such officers to acquire a knowledge of or experience in the specialties in which it is deemed necessary that such officers shall perfect themselves. The number of officers so detailed shall, as far as practicable, be distributed proportionately among the various branches: *Provided*, That no expense shall be incurred by the United States in addition to the pay and allowances of the officers so detailed, except for the cost of tuition at such technical, professional, and other educational institutions. * * * *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 786).*

Funds for payment of the above expenses are provided by the annual support of the Army act in the specific appropriations for each service involved.

2356. Details in the Aviation Section, Signal Corps.—*Provided further*, That hereafter nothing in section twenty-five of the National Defense Act of June third, nineteen hundred and sixteen, shall be held to prevent the detail of an officer in the aviation section of the Signal Corps. *Act of May 12, 1917 (40 Stat. 43).*

But see 664, 2335, and 2337, ante.

2357. Tour of duty of officers and enlisted men in Philippine Islands and the Canal Zone.—* * * *Provided further*, That on and after October first, nineteen hundred and fifteen, no officer or enlisted man of the Army shall, except upon his own request, be required to serve in a single tour of duty for more than two years in the Philippine Islands, nor more than three years in the Panama Canal Zone, except in case of insurrection or of actual or threatened hostilities: *Provided further*, That the foregoing provision shall not apply to the organization known as the Philippine Scouts. *Act of Mar. 4, 1915 (38 Stat. 1078).*

2358. Details as chiefs of Philippine Constabulary.—That officers of the Army of the United States may be detailed for service as chief and assistant chiefs, the said assistant chiefs not to exceed in number four, of the Philippine constabulary, and that during the continuance of such details the officer serving as chief shall have the rank, pay, and allowances of brigadier-general, and the officers serving as assistant chiefs shall have the rank, pay, and allowances of colonel: *Provided*, That the difference between the pay and allowances of brigadier-general and colonel, as herein provided, and the pay and allowances of the officers so detailed in the grades from which they are detailed shall be paid out of the Philippine treasury. *Sec. 1, act of Jan. 30, 1903 (32 Stat. 783).*

No officer holding a permanent commission in the Army with rank below that of major shall be detailed as chief or assistant chief of the Constabulary, and no other officers of the Army shall be detailed for duty with the Constabulary except as specifically provided by law, by provisions of sec. 1, act of Aug. 24, 1912, ante, 2349, which said provision was superseded in part at least by a provision in act of Apr. 27, 1914, ante, 2351.

But see 2311, ante.

2359. Details to Cuba and Panama.—The consent of Congress is hereby granted to the acceptance by officers of the army, in the discretion of the President, of such military details under the Governments of Cuba and Panama as may be requested by the Presidents of these Republics: *Provided*, That such details shall not exceed five in number: *And provided further*, That no officer so detailed shall receive any present, emolument, office, or title of any kind whatever from the Government of Cuba or Panama. *Act of Apr. 19, 1910 (36 Stat. 524).*

A joint resolution authorizing the detail of an officer of the Army to accept from the Government of the Greater Republic of Central America the position of instructor in a military school, Joint Res. 23, Mar. 3, 1897 (29 Stat. 704), is omitted as temporary merely.

2360. Detail of military attachés.—For contingent expenses of the Military Intelligence Division, General Staff Corps, * * * and of the military attachés at the United States embassies and legations abroad; the cost of special instruction at home and abroad, and in maintenance of students and attachés; * * * *Act of June 5, 1920 (41 Stat. 949), making appropriations for the support of the Army: General Staff Corps.*

2361. Details from the Regular Army to duty with the National Guard.—The Secretary of War shall detail officers of the active list of the Army to duty with the National Guard in each State, Territory, or District of Columbia, and

officers so detailed may accept commissions in the National Guard, with the permission of the President and terminable in his discretion, without vacating their commissions in the Regular Army or being prejudiced in their relative or lineal standing therein. The Secretary of War may, upon like application, detail one or more enlisted men of the Regular Army with each State, Territory, or District of Columbia for duty in connection with the National Guard. But nothing in this section shall be so construed as to prevent the detail of retired officers as now provided by law. *Sec. 100, act of June 3, 1916 (39 Stat. 208).*

This section superseded sec. 20, act of Jan. 21, 1903, amended by sec. 11, act of May 27, 1908, reading as follows: "Upon the application of the governor of any State or Territory furnished with material of war under the provisions of this Act, or former laws of Congress, the Secretary of War may, in his discretion, detail one or more officers or enlisted men of the Army to report to the governor of such State or Territory for duty in connection with the organized militia. All such assignments may be revoked at the request of the governor of such State or Territory or at the pleasure of the Secretary of War. * * *"

The detail or assignment of retired officers of the Army for service with the Organized Militia in the States or Territories was authorized, and their compensation while so employed was regulated, by provisions of act of Mar. 2, 1903, act of Apr. 23, 1904, and act of Mar. 2, 1905, respectively 2434, 2431, post, and 1652, ante.

2362. Officers of the Regular Army as inspectors and instructors of the National Guard.—Upon the request of the governors of the several States and Territories concerned, the President may detach officers of the active list of the Army from their proper commands for duty as inspectors and instructors of the Organized Militia, as follows, namely: Not to exceed one officer for each regiment and separate battalion of Infantry, or its equivalent of other troops: *Provided*, That line officers detached for duty with the Organized Militia under the provisions hereof, together with those detached from their proper commands, under the provisions of law, for other duty the usual period of which exceeds one year, shall be subject to the provisions of section twenty-seven of the Act approved February second, nineteen hundred and one, with reference to details to the staff corps, but the total number of detached officers hereby made subject to these provisions shall not exceed two hundred: *And provided further*, That the number of such officers detached from each of the several branches of the line of the Army shall be in proportion to the authorized commissioned strength of that branch; they shall be of the grades first lieutenant to colonel, inclusive, and the number detached from each grade shall be in proportion to the number in that grade now provided by law for the whole Army. The vacancies hereby caused or created in the grade of second lieutenant shall be filled in accordance with existing law, one-half in each fiscal year until the total number of vacancies shall have been filled: * * * *Act of Mar. 3, 1911 (36 Stat. 1045).*

Provided, That whenever practicable inspector-instructors shall use the State armories or other public buildings as offices. *Act of May 12, 1917 (40 Stat. 68), making appropriations for the support of the Army: National Guard.*

Sec. 27, act of Feb. 2, 1901, mentioned above, is set forth, 2288, ante.

But see 2337, ante.

2363. Officers of the Regular Army as chiefs of staff of divisions of the National Guard.—The President may detail one officer of the Regular Army as chief of staff and one officer of the Regular Army or the National Guard as assistant to the chief of staff of any division of the National Guard in the service of the United States as a National Guard organization: *Provided*, That in order to

insure the prompt mobilization of the National Guard in time of war or other emergency, the President may, in time of peace, detail an officer of the Regular Army to perform the duties of chief of staff for each fully organized tactical division of the National Guard. *Sec. 65, act of June 3, 1916 (39 Stat. 199).*

2364. Adjutant-general of the militia of the District of Columbia.—That the President may assign an officer of the Army to act as adjutant-general of the militia of the District of Columbia, who, while so assigned, shall be commissioned as such and be subject to the orders of the commanding general and the provisions of this act: *Provided, however,* That the officer so assigned shall receive no other pay or emolument than that to which his rank in the Army entitles him when on detached service. *Sec. 9, act of March 1, 1889 (25 Stat. 773).*

See 2540, post.

2365. Details as instructors in vocational training.— * * * *Provided,* That whenever possible officers, warrant officers, noncommissioned officers, or other enlisted men shall be detailed as instructors in vocational training in the most important trades in lieu of civilian instructors: * * * *Act of June 5, 1920 (41 Stat. 966), making appropriations for the support of the Army Vocational training.*

2366. Details as military instructors.—The President may, upon the application of any established military institute, seminary or academy, college or university, within the United States having capacity to educate at the same time not less than one hundred and fifty male students, detail an officer of the Army or Navy to act as superintendent or professor thereof; but the number of officers so detailed shall not exceed fifty from the Army and ten from the Navy, being a maximum of sixty at any time, and they shall be apportioned throughout the United States, first, to those State institutions applying for such detail that are required to provide instruction in military tactics under the provisions of the act of Congress of July second, eighteen hundred and sixty-two, donating lands for the establishment of colleges where the leading object shall be the practical instruction of the industrial classes in agriculture and the mechanic arts, including military tactics; and after that, said details to be distributed, as nearly as may be practicable, according to population. * * * *R. S. 1225, as amended by sec. 1, act of Sept. 26, 1888 (25 Stat. 491).*

That section twelve hundred and twenty-five of the Revised Statutes, concerning details of officers of the Army and Navy to educational institutions, be, and the same is hereby, amended so as to permit the President to detail under the provisions of said act not to exceed one hundred officers of the Army of the United States; and no officer shall be thus detailed who has not had five years service in the Army and no detail to such duty shall extend for more than four years and officers on the retired list of the Army may upon their own application be detailed to such duty and when so detailed shall receive the full pay of their rank; and the maximum number of officers of the Army and Navy to be detailed at any one time under the provisions of the act approved January thirteenth, eighteen hundred and ninety-one, amending section twelve hundred and twenty-five of the Revised Statutes as amended by an act approved September twenty-sixth, eighteen hundred and eighty-eight, is hereby increased to one hundred and ten. *Act of Nov. 3, 1893 (28 Stat. 7), amending R. S. 1225.*

* * * and the Secretary of War is hereby authorized to detail such available active or retired officers, warrant officers, and enlisted men of the

Regular Army as he may deem necessary to said schools and colleges, other than those provided for in section 40 of this Act: *Provided*, That while so detailed they shall receive active pay and allowances: *Provided further*, That in time of peace retired officers, warrant officers, or enlisted men shall not be detailed under the provisions of this section without their consent. *Sec. 55c, added to the act of June 3, 1916, by sec. 35, act of June 4, 1920 (41 Stat. 780).*

This section, as enacted in the Revised Statutes, authorized the detail to certain colleges or universities of officers of the Army, to act as president, superintendent, or professor thereof, not to exceed 20, increased to 30 by amendment act of July 5, 1870 (19 Stat. 74), and to 40 by act of July 5, 1884 (23 Stat. 108), and authorized the issue of small arms or field artillery for military instruction and practice by the students. It was further amended to read as set forth here by sec. 1, act of Sept. 26, 1888 (25 Stat. 491), and sec. 2 of that act repealed R. S. 1225, as amended by act of July 5, 1884, and all acts and parts of acts inconsistent with that act, saving, however, all acts and things done under such amended section.

Provisions for the detail of retired officers of the Army on their own application to serve as professors in colleges were also made by post, 2428.

Act of Nov. 3, 1893, was further amended by act of Mar. 3, 1909, ante, 1053.

Notes of Decisions.

Discretion as to detail.—It is within the discretion of the President to make the detail of officers of the Army for colleges wholly from the active list of the Army, or wholly from retired officers, or from both lists in such proportion as he sees fit and the applications for such detail from the retired officers will allow. (1893) 20 Op. Atty. Gen. 687.

Limit of number.—No other limit than 100 is set to the number of officers that can be detailed from either the active or retired lists. (1893) 20 Op. Atty. Gen. 687.

Five years' service.—The five years' service required by this section applies to officers detailed from either the active or re-

tired lists. (1893) 20 Op. Atty. Gen. 687.

Term of service on detail.—The limit of detail to four years applies to officers detailed from either the active or retired lists. (1893) 20 Op. Atty. Gen. 687.

Pay.—Officers of the retired list detailed for college duties prior to November 3, 1893, and still on duty under such detail, held entitled to full pay, beginning from the passage of the act. (1893) 20 Op. Atty. Gen. 687.

Quarters, etc.—An officer detailed under this section at his own request is not entitled to commutation for quarters or mileage. *Spencer v. U. S.* (1906), 41 Ct. Cl. 430.

2367. Details at institutions maintaining units of the Reserve Officers' Training Corps.—The President is hereby authorized to detail such numbers of officers, warrant officers, and enlisted men of the Regular Army, either active or retired, as may be necessary for duty as professors of military science and tactics, assistant professors of military science and tactics, and military instructors at educational institutions where one or more units of the Reserve Officers' Training Corps are maintained. In time of peace retired officers, retired warrant officers, or retired enlisted men shall not be detailed under the provisions of this section without their consent, and no officer on the active list shall be detailed for recruiting service or for duty at a school or college, not including schools of the service, where officers on the retired list can be secured who are competent for such duty. * * * *Sec. 40b, added to the act of June 3, 1916, by sec. 33, act of June 4, 1920 (41 Stat. 777).*

The above topic was treated by secs. 45 and 46, act of June 3, 1916 (39 Stat. 192), which were stricken out by sec. 33, act of June 4, 1920, above cited.

Sec. 1, act of Apr. 17, 1918 (40 Stat. 531), suspended the operation of secs. 45, 46 and 56, act of June 3, 1916, above, for the period of the World War. By sec. 2 of the same act these military instructors were to be detailed from active or retired officers not above the grade of colonel, the active officers detailed not to exceed a thousand.

2368. Details of officers and enlisted men as instructors at rifle ranges.— * * * That the President may detail capable officers and noncommissioned officers of the Regular Army and National Guard to duty at such ranges as instructors for the purpose of training the citizenry in the use of the military arm. * * * *Sec. 113, act of June 3, 1916 (39 Stat. 211).*

2369. Director of Civilian Marksmanship.— * * * *Provided,* That the President be, and he is hereby, authorized, in his discretion, to appoint, as Director of Civilian Marksmanship, under the direction of the Secretary of War, an officer of the Army or of the Marine Corps. *Act of Aug. 29, 1916 (39 Stat. 648).*

2370. Details in connection with Indian education.—That the Secretary of War shall be authorized to detail an officer of the Army, not above the rank of Captain, for special duty with reference to Indian education. *Sec. 7, act of June 23, 1879 (21 Stat. 35).*

That the Secretary of War be, and he is hereby, authorized to set aside, for use in the establishment of normal and industrial training schools for Indian youth from the nomadic tribes having educational treaty claims upon the United States, any vacant posts or barracks, so long as they may not be required for military occupation, and to detail one or more officers of the Army for duty in connection with Indian education, under the direction of the Secretary of the Interior, at each such school so established: * * * *Act of July 31, 1882 (22 Stat. 181).*

Notes of Decisions.

Schools for Indians.—The Secretary of War held to have had authority to set apart such portion of the Fort Sill Military Reservation as was required for the erection of the necessary buildings to be used as a mission and school for the Apache

prisoners of war, and to make such rules and regulations as were suitable and necessary to control the methods and operations of the persons engaged in that work. (1899) 22 Op. Atty. Gen. 308.

2371. Indian agents.— * * * *Provided,* That hereafter the President may detail officers of the United States Army to act as Indian agents at such agencies as, in the opinion of the President, may require the presence of an army officer, and while acting as Indian agents such officers shall be under the orders and direction of the Secretary of the Interior: * * * *Act of July 1, 1898 (30 Stat. 573).*

This provision superseded a somewhat similar proviso of sec. 1, act of July 13, 1892 (27 Stat. 120), and R. S. 2062, authorizing the President to require any military officer to execute the duties of an Indian agent.

Notes of Decisions.

Authority of President while Senate is in session.—The power conferred by R. S. 2062 is not controlled by the fact that the Senate is in session. (1877) 15 Op. Atty. Gen. 405.

Officers of Army to act as Indian agents.—Under R. S. 2053, the President has discretionary power to dispense with the services of any Indian agent; and, under R. S. 1224, post, 2376, he is authorized

to assign a military officer to execute the duties of such agent, if this can be done without separating the officer from his company, regiment, or corps, or otherwise interfering with the performance of his military duties; or, under R. S. 2053, he may devolve the duties of such agent upon an agent who has been appointed for another agency. (1877) 15 Op. Atty. Gen. 405.

2372. Issues to Indians certified by an Army officer.—The superintendent, agent, or sub-agent, together with such military officer as the President may

direct, shall be present and certify to the delivery of all goods and money required to be paid or delivered to the Indians. *R. S. 2088.*

The word "superintendent," in this section, has become inoperative; no appropriation for any superintendent of Indian affairs having been made since act of Mar. 3, 1877 (19 Stat. 271).

2373. Civil office not to be held by commissioned officers.—No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated. *R. S. 1222.*

* * * Fourth. No person belonging to the Army or Navy shall be elected to or hold any civil office or appointment in any Territory, except officers of the Army on the retired list. *R. S. 1860, as amended by act of Mar. 3, 1883 (22 Stat. 567).*

This section was not to apply to an officer designated by the President to perform the duties of the Secretary of War, under sec. 1, act of Aug. 5, 1882, ante, 485.

Notes of Decisions

Officers included.—This section applies only to officers of the Regular Army. (1898) 22 Op. Atty. Gen. 88. It does not apply to officers on the retired list. *Badeau v. U. S.* (1889), 9 Sup. Ct. 579, 130 U. S. 439, 32 L. Ed. 997; (1889) 19 Op. Atty. Gen. 283; *Meigs v. U. S.*, 19 Ct. Cls. 497; *Converse v. U. S.*, 21 How. 464; *U. S. v. Brindle*, 110 U. S. 688; *U. S. v. Saunders*, 120 U. S. 126.

The office of chief clerk of a department and that of an officer on the retired list are not incompatible, and a person may hold both such offices. *Geddes v. U. S.* (1903), 38 Ct. Cl. 428.

Volunteer Army officers.—The commission of the attorney general of the State of South Dakota as an officer in the Volunteer Army held not vacated by reason of this section. (1898) 22 Op. Atty. Gen. 88.

City Park Commissioner.—Sec. 18, act July 15, 1870 (embodied herein), prohibits any officer on active list accepting function of city park commissioner; prohibition of section extends to State as well as Federal offices and to those with compensation as well as those without same. (1870) 13 Op. Atty. Gen. 310.

Philippine Office.—An Army officer's acceptance of a small sum of money from the Philippine Government held not to make him a civil officer. *Carrington v. U. S.* (1908), 28 Sup. Ct. 203, 208 U. S. 1, 52 L. Ed. 367.

Secretary of War.—This section would prohibit a General of the Army from acting

as Secretary of War without vacating his commission as General of the Army. (1873) 14 Op. Atty. Gen. 200.

Officer of National Guard.—An officer on the active list of the Regular Army may accept the office of colonel in the National Guard of a State, without violating the provisions of this section. (1912) 29 Op. Atty. Gen. 298.

California Débris Commission.—The members of the California Débris Commission do not come within the prohibition of this section. (1893) 20 Op. Atty. Gen. 604.

Detail to Geological Survey.—This section does not forbid the detail by the Secretary of War of an officer of the Army on the active list for duty on the Geological Survey, under the Interior Department. (1880) 16 Op. Atty. Gen. 499.

Board of experts.—An officer of the Army, who was tendered a place on a "board of experts," created by a city ordinance to determine the most durable and best pavement for the streets of the city, should not, in view of the provisions of this section, accept the position offered. (1884) 18 Op. Atty. Gen. 11.

Railway trustees.—The position of trustee of the Cincinnati Southern Railway, created by a statute of Ohio, held to be a civil office within the meaning of this section, and therefore, upon acceptance of an appointment to such trusteeship by an officer of the Army, his commission in the Army would become vacated. (1876) 15 Op. Atty. Gen. 551.

2374. Diplomatic or consular office not to be held by commissioned officers.—Any officer of the Army who accepts or holds any appointment in the diplomatic

or consular service of the Government shall be considered as having resigned his place in the Army, and it shall be filled as a vacancy. *R. S. 1223.*

* * * *Provided, That no salary herein appropriated shall be paid to any official receiving any other salary from the United States Government. Act of Mar. 2, 1921 (41 Stat. 1206), making appropriations for the Diplomatic and Consular Service.*

Notes of Decisions.

Retired Army officers.—This section prohibits retired officers from holding an appointment in the diplomatic or consular service. *Badeau v. U. S.* (1889), 9 Sup. Ct. 579, 582, 130 U. S. 439, 32 L. Ed. 997; *Tyler v. Same* (1880), 16 Ct. Cl. 223; (1877) 15 Op. Atty. Gen. 306; (1800) 19 Op. Atty. Gen. 609. Except such retired officers as are mentioned in 2423, post, (1877) 15 Op. Atty. Gen. 306, 407. And an officer, within the exception above mentioned, who performs the duties of a civil office, which he may lawfully hold, under and by virtue of an appointment to such office, is entitled to draw his pay as a retired officer, and also the salary provided for the civil office during the period of his incumbency of the latter office. (1877) 15 Op. Atty. Gen. 306. But the solution of the question whether an officer on the re-

tired list of the Army can accept a diplomatic or consular appointment and still hold his position on the retired list with rank and pay is a matter of his private concern only, and not a subject with which the United States can be concerned until some action has been taken by such officer. (1897) 21 Op. Atty. Gen. 510.

Where an officer on the retired list accepts a diplomatic office, such acceptance vacates the military office eo instanti, and the vacancy thus created necessarily continues until filled in the usual way. And such an officer, after having been dropped from the Army list, can not be reinstated by order of the Secretary of War on the supposition that he was within the exception contained in 2423, post. (1890) 19 Op. Atty. Gen. 609. And see (1877) 15 Op. Atty. Gen. 407.

2375. Disabled retired officers holding diplomatic or consular office.—That the accounting officers of the Treasury are hereby directed not to suspend or withhold the pay of any retired officer of the Army whose name was upon the retired list prior to the passage of the act of March third, eighteen hundred and seventy-five, and having lost an arm or leg, or having an arm or leg permanently disabled by reason of resection on account of wounds or having lost both eyes by reason of wounds received in battle has been retained upon said list by the Secretary of War in obedience to the act of March third, eighteen hundred and seventy-five notwithstanding such officer accepted and held a diplomatic or consular office. *Act of Mar. 3, 1891 (26 Stat. 872).*

For the act of Mar. 3, 1875, see 2423, post.

2376. Civil employment of commissioned officers restricted.—No officer of the Army shall be employed on civil works or internal improvements, or be allowed to engage in the service of any incorporated company, or be employed as acting paymaster or disbursing-agent of the Indian Department, if such extra employment requires that he shall be separated from his company, regiment, or corps, or if it shall otherwise interfere with the performance of the military duties proper. *R. S. 1224, as amended by act of Feb. 27, 1877 (19 Stat. 243).*

This section, as enacted in the Revised Statutes, was as follows:

"Officers of the Army on the active list shall not be separated from their regiments or corps for employment on civil works of internal improvement, nor be allowed to engage in the service of incorporated companies, or be employed as acting paymaster, or disbursing agent of the Indian department, if such extra employment require that he be separated from his regiment or company, or otherwise interfere with the performance of the military duties proper."

It was stricken out, and the section as set forth here was inserted in lieu thereof, as cited above.

Notes of Decisions.

River and harbor improvements.—A retired officer of the Army is not ineligible to receive a civil appointment at a fixed rate of compensation, to take charge of work in connection with the improvement of rivers and harbors. (1889) 19 Op. Atty. Gen. 283.

World's Columbian Exposition improvements.—The detail of an officer of the Army to report to the president of the World's Columbian Commission, with a view to his assignment by the latter to the duties of an engineer in the preparation and construction of buildings, grounds, etc., for the Columbian Exposition, held

within the prohibition of this section, provided the performance of such duties required the officer to be separated from his company, regiment, or corps, or interferes with the discharge of his military duties. (1890) 19 Op. Atty. Gen. 600.

Leaves of absence.—Where a leave of absence is asked by an Army officer, for the very purpose of enabling him to undertake the employments prohibited by this section, the granting of such leave would be an evasion of the statute and be unwarranted. (1890) 19 Op. Atty. Gen. 600; (1918) 89 Op. Atty. Gen. 184.

2377. Appointment of chaplains.—There shall be one chaplain for every twelve hundred officers and enlisted men of the Regular Army, exclusive of the Philippine Scouts and the unassigned recruits, authorized from time to time in accordance with law and within the peace strength permitted by this Act. * * * Of the vacancies existing on July 1, 1920, such number as the President may direct shall be filled by appointment on that date of persons under the age of fifty-eight years, other than chaplains of the Regular Army, who served as chaplains in the Army at some time between April 6, 1917, and the date of the passage of this Act. Such appointments may be made in grades above the lowest under the same restrictions as to age and rank as are hereinafter prescribed for original appointments in other branches of the service, and in accordance with the recommendation of the board of officers provided for in section 24. For purposes of future promotion, persons so appointed shall be considered as having had, on the date of appointment, sufficient prior service to bring them to their respective grades under the rules of promotion established in this section. *Sec. 15, act of June 3, 1916 (39 Stat. 176), as amended by sec. 15, act of June 4, 1920 (41 Stat. 769).*

Sec. 15, act of June 3, 1916, was amended by act of May 12, 1917 (40 Stat. 72), and act of May 25, 1918 (40 Stat. 561). Both amendments were superseded.

The office of chaplain existed in the Revolutionary armies, as is indicated by the requirement of sec. 1, art. 4, of the Rules and Articles of War of 1776, which provides a penalty for the nonperformance of the duties appropriate to the office. The act of Mar. 3, 1791 (1 Stat. 222), authorized the appointment of a chaplain in case the President might "deem such appointment necessary to the public interest." As the act contemplated a brigade organization, it would appear that the office thus conditionally created was that of a brigade rather than a regimental chaplain. The inclusion of the chaplain in the "General Staff," in sec. 7 of the act of Mar. 6, 1792 (id. 242), and Mar. 3, 1795 (id. 430), would also seem to indicate the correctness of this view. No provision was made for the services of chaplains in the enactments respecting the Militia of May 2, 1792 (id. 264), and May 8, 1792 (id. 267), nor in the militia act of Jan. 21, 1803 (32 Stat. 775). The office of chaplain was discontinued on Oct. 1, 1796, in conformity to the requirements of the act of May 30, 1796 (id. 483), "to ascertain and fix the military establishment of the United States." The acts authorizing the creation of a provisional army, approved May 28, 1798 (id. 561), made no provision for the services or compensation of chaplains, but this omission was supplied by a provision for four chaplains in the act of July 16, 1798 (id. 604), who were to be attached to the General Staff, and were to receive the pay and allowances of majors. No provision was made for these officers, however, in the act of Mar. 3, 1799 (id. 749). By the acts of Feb. 2, 1800 (2 id. 7), and May 14, 1800 (id. 85), the operation of the foregoing enactments was suspended, and the act of Mar. 16, 1802 (id. 133), contained no provision for chaplains, or for the procurement of religious services at military posts.

The act of Apr. 12, 1808 (2 Stat. 481, sec. 7), passed in contemplation of war with England, authorized the appointment of brigade chaplains, and similar provision was made in sec. 24 of the act of Feb. 6, 1812 (id. 671), which conferred upon these officers the pay and allowances of majors of Infantry, and this last-named provision was repeated in sec. 16 of the act of Jan. 20, 1813 (id. 791). The acts of Mar. 3, 1815 (3 Stat. 224); Apr. 24, 1816 (id. 297); Apr. 14, 1818 (id. 420); Apr. 20, 1818 (id. 460); Mar. 2, 1821 (id. 615), to reduce and fix the military peace establishment, made no provision for these officers which then ceased to exist.

The office of post chaplain was established by sec. 18 of an act of July 5, 1838 (5 Stat. 259), appointments thereto being vested in the councils of administration of the several military posts. The chaplains were to act as post schoolmasters, and their compensation was to be fixed by the post councils, with the approval of the Secretary of War, but was in no case to exceed \$40 per month with four rations per day and an established allowance of fuel and quarters. The number of chaplain posts was fixed at 20 by the act of July 7, 1838 (id. 308), which were to be designated by the Secretary of War, and were to be "confined to places most destitute of instruction." By sec. 8 of the act of Mar. 2, 1849 (9 Id. 351), 10 additional chaplains were authorized, and by sec. 2 of the act of Feb. 21, 1857 (11 Stat. 163), the monthly pay proper of chaplains was increased to a sum not exceeding \$80, subject to the approval of the post council of administration.

For each of the regiments of Volunteers authorized to be raised for the War with Mexico a chaplain was authorized, and power was conferred upon the President to order the existing post chaplains to the theater of active operations, and, in the event of their refusal to obey such order, their offices were to be declared vacant by the Adjutant General of the Army; sec. 7, act of Feb. 11, 1847 (9 Stat. 124). During the Civil War a chaplain was authorized for each regiment of Volunteers, who was to have the pay and allowances of a captain of Cavalry; sec. 9, act of July 22, 1861 (12 Stat. 270). By sec. 7 of the act of Aug. 3, 1861 (id. 288), none but ministers of some Christian denomination were to be eligible for appointment. By sec. 2 of the act of May 30, 1862 (id. 404), the President was authorized to appoint a chaplain for each general hospital; by the act of July 17, 1862 (id. 594), their pay and allowances were fixed and the qualifications for the office were established. Rank without command was conferred by the act of Apr. 9, 1864 (13 Id. 40), in which enactment their duties were still further defined. By sec. 31 of the act of July 28, 1866 (14 Id. 337), the existing force was recognized and continued, and one chaplain was authorized for each regiment of colored troops established, "whose duty shall include the instruction of the enlisted men in the common English branches of education;" by sec. 7 of the act of Mar. 2, 1867 (id. 423), the rank of captain of Infantry, without command, was conferred, and chaplains were placed upon the same footing in respect to pay, allowances, and emoluments as other officers of the Army.

Thirty post chaplains, and four regimental chaplains for the four regiments of colored troops provided for by R. S. 1104, 1108, were authorized by R. S. 1094, 1121; and act of Apr. 26, 1898 (30 Stat. 364), which reorganized the line of the Army, contained a proviso, annexed to sec. 1 thereof, that it should not be construed as abolishing the office of chaplain in each regiment of colored troops. Thirty chaplains, to be assigned to regiments or posts in the discretion of the Secretary of War, were provided for by act of Mar. 2, 1899 (30 Stat. 977), with provisos, annexed to secs. 2 and 4 thereof, that it should not be construed as abolishing the office of chaplain in each regiment of colored Cavalry or colored Infantry.

By sec. 12 of the act of Feb. 2, 1901 (31 Stat. 750), the distinction between post and regimental chaplains was abolished and chaplains were thereafter required to be assigned to regiments of the line or to stations occupied by the troops of the corps of Artillery.

A chaplain for the Corps of Engineers was authorized by a provision of act of June 12, 1906 (34 Stat. 256).

2378. Designation of chaplains.—That all officers provided for in this Act shall have a uniform designation in official address as chaplains of their respective regiments or of the Artillery Corps. *Sec. 2, act of April 21, 1904 (33 Stat. 226).*

But see 2383, post.

2379. Chaplains at large.—That the President may appoint for service during the present emergency not exceeding twenty chaplains at large for the United States Army representing religious sects not recognized in the apportionment

of chaplains now recognized by law: *Provided*, That no person shall be eligible to such appointment unless he be at the time of his appointment a citizen of the United States. *Act of Oct. 6, 1917 (40 Stat. 394).*

2380. Religious status of chaplains.—No person shall be appointed as regimental or post chaplain until he shall have furnished proof that he is a regularly-ordained minister of some religious denomination, in good standing at the time of his appointment, together with a recommendation for such appointment from some authorized ecclesiastical body, or from not less than five accredited ministers of said denomination. *R. S. 1123.*

* * * Appointments as chaplains shall be made from among persons duly accredited by some religious denomination or organization, and of good standing therein, between the ages of twenty-three and forty-five years. * * * *Sec. 24e, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 774).*

For intermediate legislation see note to 2877, ante.

Notes of Decisions.

<p>Qualification of chaplains.—A person of African descent, if otherwise qualified, may be commissioned as chaplain of a regiment</p>	<p>of Volunteers. (1864) 11 Op. Atty. Gen. 37.</p>
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2381. Examinations of chaplains.— * * * That no person in civil life shall hereafter be appointed a * * * chaplain until he shall have passed satisfactorily such examination as to his moral, mental, and physical qualifications as may be prescribed by the President: * * * *Sec. 7, act of Mar. 2, 1899 (30 Stat. 979).*

But see 2279, ante.

2382. Status of chaplains.—Chaplains shall have the rank of captains of infantry, without command, and shall be on the same footing with other officers of the Army, as to tenure of office, retirement, and pensions. *R. S. 1122.*

But see 2383, post.

Notes of Decisions.

<p>Effect of section in general.—This section distinctly recognized that post chaplains at the time of its adoption were in the service. <i>U. S. v. La Tourette (1894), 14 Sup. Ct. 422, 424, 151 U. S. 572, 38 L. Ed. 274.</i></p>	<p>Appointment during recess of Senate.—One, an officer appointed and commissioned a post chaplain during a recess of the Senate, comes within this section. <i>O'Shea v. U. S. (1893), 28 Ct. Cl. 392.</i></p>
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2383. Rank and promotion of chaplains.— * * * Chaplains shall hereafter have rank, pay, and allowances according to length of active commissioned service in the Army, or, since April 6, 1917, in the National Guard while in active service under a call by the President, as follows: Less than five years, first lieutenant; five to fourteen years, captain; fourteen to twenty years, major; over twenty years, lieutenant colonel. * * * *Sec. 15, act of June 3, 1916 (39 Stat. 176), as amended by sec. 15, act of June 4, 1920 (41 Stat. 769).*

The act of Apr. 21, 1904 (33 Stat. 226), permitted promotion to the grade of major for 15 chaplains of exceptional efficiency, and provided that chaplains should be appointed with the grade of first lieutenants and promoted captains after seven years of service.

2384. Transfers of chaplains.— * * * Chaplains may be assigned to such stations as the Secretary of War shall direct, and they may be transferred, as

chaplains, from one branch of the service or from one regiment to another, by the Secretary of War, without further commission. * * * *Sec. 12, act of Feb. 2, 1901 (31 Stat. 750).*

2385. Chief of chaplains.— * * * One chaplain, of rank not below that of major may be appointed by the President, by and with the advice and consent of the Senate, to be chief of chaplains. He shall serve as such for four years, and shall have the rank, pay, and allowances of colonel while so serving. His duties shall include investigation into the qualifications of candidates for appointment as chaplain, and general coordination and supervision of the work of chaplains. * * * *Sec. 15, act of June 3, 1916 (39 Stat. 176), as amended by sec. 15, act of June 4, 1920 (41 Stat. 769).*

2386. Religious services by chaplains.—All regimental chaplains and post chaplains shall, when it may be practicable, hold appropriate religious services, for the benefit of the commands to which they may be assigned to duty, at least once on each Sunday, and shall perform appropriate religious burial services at the burial of officers and soldiers who may die in such commands. *R. S. 1125.*

The words of this section "and post chaplains" were superseded by the abolition of the office of post chaplain, and the assignment of chaplains to regiments, etc., by sec. 12, act of Feb. 2, 1901 (31 Stat. 750).

2387. Chaplains to act as teachers.—The duty of chaplains of regiments of colored troops and of post chaplains shall include the instruction of the enlisted men in the common English branches of education. *R. S. 1124.*

See note to 2386, ante.

The duties of chaplains are prescribed in Circular No. 42, W. D., Feb. 17, 1921.

2388. Facilities for chaplains.—It shall be the duty of commanders of regiments, hospitals, and posts to afford to chaplains, assigned to the same for duty, such facilities as may aid them in the performance of their duties. *R. S. 1127.*

2389. Reports by chaplains.—Post hospital and regiment chaplains shall make monthly reports to the Adjutant-General of the Army, through the usual military channels, of the moral condition and general history of the regiments or posts to which they may be attached. *R. S. 1126.*

Section eleven hundred and twenty six is amended by inserting a comma after the word "post", in the first line. *Act of Feb. 27, 1877 (19 Stat. 242), amending R. S. 1126.*

See note to 2386, ante.

2390. Officers of Philippine Scouts.— * * * On July 1, 1920, all officers of the Philippine Scouts on the active list, who are citizens of the United States and are found qualified under such regulations as the President may prescribe, shall be recommissioned in some one of the branches provided for by this Act, and those not so recommissioned shall continue to serve under their commissions as officers of the Philippine Scouts. * * * *Sec. 22a, added to the act of June 3, 1916, by sec. 22, act of June 4, 1920 (41 Stat. 770).*

Prior to the above, officers for the Philippine Scouts were transferred from the line of the Army under the provisions of sec. 36, act of Feb. 2, 1901 (31 Stat. 757). See also 2391, post.

2391. Filipinos eligible as officers of Philippine Scouts.— * * * When, in the opinion of the President, natives of the Philippine Islands shall, by their services and character, show fitness for command, the President is authorized to

make provisional appointments to the grades of second and first lieutenants from such natives, who, when so appointed, shall have the pay and allowances to be fixed by the Secretary of War, not exceeding those of corresponding grades of the Regular Army. *Sec. 36, act of Feb. 2, 1901 (31 Stat. 757).*

* * * No further appointments shall be made as officers of Philippine Scouts except of citizens of the Philippine Islands, who may be appointed in the grade of second lieutenant, under such regulations as the President may prescribe. Officers commissioned in the Philippine Scouts shall be subject to promotion, classification, and elimination, as hereinafter prescribed for officers of the Regular Army. * * * *Sec. 22a, added to the act of June 3, 1916, by sec. 22, act of June 4, 1920 (41 Stat. 770).*

But see 2268, ante.

2392. Captains of Philippine Scouts.—That the office of captain in the Philippine Scouts is hereby created as a grade of rank in the military establishment. Such captains shall be selected from officers of the grade of first lieutenants in said scouts, and shall be given provisional appointments for periods of four years each, and no such appointments shall be continued for a second or subsequent period unless the officers' conduct shall have been satisfactory in every respect: *Provided*, That the number of officers provisionally appointed under the terms of this Act shall not at any time exceed the number of companies of said native troops which may be formed by the President from time to time for service in the Philippine Islands. *Act of May 16, 1908 (35 Stat. 163).*

Before this act the captains of the troops or companies of the Philippine Scouts were selected from first lieutenants of the line of the Regular Army, by a provision of sec. 36, act of Feb. 2, 1901 (31 Stat. 757), which was superseded by this act.

But see 2390, ante.

2393. Concurrent commissions in Philippine Scouts and in drafted forces.—That officers of the Philippine Scouts be, and they hereby are, made eligible to appointment as officers in the militia or other locally created armed forces in the Philippine Islands which have been or shall hereafter be drafted into the service of the United States; and any such officer of the Philippine Scouts so appointed as an officer in said drafted forces shall not thereby vacate his commission in the Philippine Scouts, and in case his commission in said Philippine Scouts shall terminate while holding a commission in said drafted forces as aforesaid, he shall thereupon be eligible to reappointment as an officer of said Philippine Scouts notwithstanding his retention of a commission in said drafted forces. *Sec. 1, act of March 30, 1918 (40 Stat. 500).*

The above is emergency legislation and no longer operative.

2394. Computation of service of officers of Philippine Scouts.—That in computing period of service for any purpose officers of the Philippine Scouts shall be credited with all time served as commissioned officers in the drafted forces mentioned in section one of this Act. *Sec. 2, act of March 30, 1918 (40 Stat. 501).*

2395. Officers of Porto Rico Provisional Regiment of Infantry recommissioned in the Porto Rico Regiment of Infantry.—That the present captains and lieutenants of the Porto Rico Provisional Regiment of Infantry appointed or who were reappointed after a mental, physical, and professional examination, may be recommissioned as officers of the Porto Rico Regiment of Infantry. *Sec. 3, act of May 27, 1908 (35 Stat. 392).*

But see 2128, ante.

2396. Permanent captains, Porto Rico Regiment of Infantry, recommissioned as captains of Infantry of the United States Army.—*Provided*, That the permanent captains of the Porto Rico Regiment of Infantry now holding commissions as such in said regiment shall be recommissioned as captains of Infantry of the United States Army, to take rank on the lineal list of officers of Infantry immediately after the junior officers of the same grade whose total commissioned service equals or exceeds theirs: *Provided further*, That those officers of the Porto Rico Regiment of Infantry, recommissioned as captains of Infantry, whose total commissioned service is less than that of any officer of Infantry of the next lower grade, shall not advance on the lineal list of captains of Infantry, nor on the relative list of officers of the United States Army, until such time as there no longer remains on the lineal list of officers of Infantry any officer of the next lower grade of equal or greater length of total commissioned service and shall take rank in the grade of captain on the lineal list of officers of Infantry and on the relative list of officers of the United States Army immediately after the juniors in rank of such officers of Infantry of equal or greater total commissioned service: *Provided*, That for the purpose of this Act total commissioned service shall include commissioned service in the Regular Army, in the Volunteers, in the Porto Rico Provisional Regiment of Infantry, and in the Porto Rico Regiment of Infantry, and that the commissioned service of those officers of the Porto Rico Regiment of Infantry who were officers of the Porto Rico Provisional Regiment of Infantry, shall be counted as continuous and uninterrupted between the twenty-ninth day of June, nineteen hundred and eight, and the thirty-first day of December, nineteen hundred and eight. *Act of March 4, 1915 (38 Stat. 1070).*

But see 2128, ante.

The captains referred to in this section were provided for by sec. 3, act of May 27, 1908, ante, 2395.

2397. Composition of a retiring board.—The Secretary of War, under the direction of the President, shall, from time to time, assemble an Army retiring board, consisting of not more than nine nor less than five officers, two-fifths of whom shall be selected from the Medical Corps. The board, excepting the officer selected from the Medical Corps, shall be composed, as far as may be, of seniors in rank to the officer whose disability is inquired of. *R. S. 1246.*

Notes of Decisions.

<p>Composition of board.—This section does not authorize the Secretary of War or the Secretary of the Navy to assemble a mixed board of Army and Marine officers for</p>	<p>inquiry into the cases of disabled officers of the Army and of the Marine Corps. (1861) 10 Op. Atty. 116.</p>
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2398. Oath of member of a retiring board.—The members of said board shall be sworn in every case to discharge their duties honestly and impartially. *R. S. 1247.*

2399. Powers of a retiring board.—A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose. *R. S. 1248.*

Notes of Decisions.

<p>Waiver of irregularities.—When an officer appears before a military board and makes no objection to its proceedings or rulings,</p>	<p>he waives irregularities. <i>Carrick v. U. S.</i> (1869), 24 Ct. Cl. 264.</p>
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2400. Findings of a retiring board.—When the board finds an officer incapacitated for active service, it shall also find and report the cause which, in its judgment, has produced his incapacity, and whether such cause is an incident of service. *R. S. 1249.*

Notes of Decisions.

Effect of findings.—The proceedings of a board constituted without authority and in violation of that act would be open to future question as to their validity. (1861) 10 Op. Atty. Gen. 116.

2401. Revision by the President of proceedings of a retiring board.—The proceedings and decision of the board shall be transmitted to the Secretary of War, and shall be laid by him before the President for his approval or disapproval and orders in the case. *R. S. 1250.*

Notes of Decisions.

Power of President in general.—The retired list of the Army is regulated by positive law, being that form of compensation adopted by the Government for those who have spent their lives in the service of their country. The power of the President with reference thereto is regulated alone by acts of Congress, but such regulation can in no wise interfere with his constitutional power as Commander in Chief. When, however, a law is passed for the regulation of the Army which does not

impair the efficiency of the President as Commander in Chief, he becomes as to that law an executive officer, and is limited in the discharge of his duty by the statute. *McBlair v. U. S.* (1884), 19 Ct. Cl. 528.

Necessity of approval by President.—No officer can be retired from the Army upon the report of any board, even if approved by the Secretary of War, except it is also approved by the President. (1826) 21 Op. Atty. Gen. 385.

2402. Unlimited retired list.— * * * *Provided*, That nothing contained in the act making appropriations for the support of the Army for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, approved June thirtieth, eighteen hundred and eighty-two, shall be so construed as to prevent, limit, or restrict retirements from active service in the Army, as authorized by law in force at the date of the approval of said act, retirements under the provisions of said act of June thirtieth, eighteen hundred and eighty-two, being in addition to those theretofore authorized by law: * * * *Act of Mar. 3, 1883 (22 Stat. 457).*

The provisions of act of June 30, 1882, mentioned in this section, are set forth, 2403, post.

Conditions of retirement according to statutes now in force may be summarized as follows: Officers may be placed on the limited retired list "after serving 30 years," "after serving 40 years," "after serving 45 years," or upon reaching "the age of 62 years," if the President approve. The unlimited retired list includes officers incapacitated or disabled, Class B officers, and officers who have passed the age of 64 years. Officers may be wholly retired for disability not incident to service, or discharged with one year's pay for being placed in Class B.

2403. Compulsory retirement at the age of 64, or after 40 years of service.— * * * *And provided further*, That on and after the passage of this act when an officer has served forty years either as an officer or soldier in the regular or volunteer service, or both, he shall, if he make application therefor to the President, be retired from active service and placed on the retired list, and, when an officer is sixty-four years of age, he shall be retired from active service and placed on the retired list: *Provided further*, That the General of the Army, when retired, shall be retired without reduction in his current pay and allowances; and no act now in force shall be so construed as to limit or restrict

the retirement of officers as herein provided for: * * * *Act of June 30, 1882 (22 Stat. 118).*

The retirements provided for by this act were to be in addition to those previously authorized by law, by 2402, ante.

Notes of Decisions.

Officers serving in Volunteer Army.—The Volunteer service contemplated by this section (and other prior similar acts) was clearly the Volunteer service of the Civil War, and can not be held to be prospective, and to have anticipated a new Volunteer service. (1899) 22 Op. Atty. Gen. 199.

An officer of the Regular Army who is 64 years of age, temporarily serving under a Volunteer commission, may be retired under this section, without affecting his status in the Volunteer service. This section does not, however, apply to a Volun-

teer officer, not being in the Regular Army, who is 64 years of age. (1898) 22 Op. Atty. Gen. 176; (1899) Id. 199.

Expert accountant.—An expert accountant in the Inspector General's Department is not entitled to be placed on the retired list on the ground that he has reached the age of 64 years, because he is not an officer of the Army within the meaning of the statutes of the United States conferring the privilege of retirement. (1911) 29 Op. Atty. Gen. 249.

2404. Vacant.

2405. Retirement upon officer's own application.—When an officer has served forty consecutive years as a commissioned officer, he shall, if he makes application therefor to the President, be retired from active service and placed upon the retired list. When an officer has been thirty years in the service, he may, upon his own application, in the discretion of the President, be so retired, and placed on the retired list. *R. S. 1243.*

Notes of Decisions.

Officers retired.—Under R. S. 1094 (now superseded), officers of the Army on the retired list were a part of the Army, and therefore no one could be put upon the retired list who was not an officer of the Army, appointed in the manner required by Const. art. 2, sec. 2. *Wood v. U. S.* (1882), 2 Sup. Ct. 551, 554, 107 U. S. 414, 27 L. Ed. 542.

Officer summarily dismissed.—Where an officer has been summarily dismissed from the service, such dismissal creates a vacancy in the office which he held, which can only be filled by appointment, with the advice and consent of the Senate. Consequently he can not be restored to such office by an order revoking the dismissal and reinstating him. Hence, where he has been restored in such manner, he is not

entitled to be placed on the retired list under this section. (1888) 19 Op. Atty. Gen. 202.

Military secretary.—In (1874) 14 Op. Atty. Gen. 508, it was held that a military secretary, who had been appointed as such on the staff of a general, who was entitled to such military secretary only so long as he retained his rank as such general, could not be placed on the retired list, because of the fact that such appointment as military secretary had been terminated by the retirement of the general to whose staff he had been appointed, and he was consequently no longer on the Army list. This opinion was reaffirmed in (1881) 17 Op. Atty. Gen. 9.

See also notes to 2407, post.

2406. Retirement of Class B officers.—* * * Whenever an officer is placed in Class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct or avoidable habits. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay at the rate of 2½ per centum of his active pay multiplied by the number of complete years of commissioned service, or service which under the provisions of this Act is counted as its equivalent, unless his total commissioned service or

equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's pay. The maximum retired pay of an officer retired under the provisions of this section prior to January 1, 1924, shall be 75 per centum of active pay, and of one retired on or after that date, 60 per centum. * * * *Sec. 24b, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 773).*

For classes A and B, see ante, 2280, 2281.

§2407. Retirement for incapacity.—When any officer has become incapable of performing the duties of his office, he shall be either retired from active service, or wholly retired from the service, by the President, as hereinafter provided. *R. S. 1245.*

Notes of Decisions.

Retirement in general.—The department of the service called retirement being the creation of statute, he who claims a right in it must depend for the measure of his claim on the terms of the law. *McBlair v. U. S.* (1884), 10 Ct. Cl. 528.

Officers within provisions.—Paymasters' clerks in the Army are properly appointed by the Secretary of War, and are officers of the United States, within the constitutional meaning of that term. They are officers in the regular service, within the meaning of acts of Congress respecting retirement. (1909) 27 Op. Atty. Gen. 493.

Grounds for retirement.—An officer of the Army can not be retired for incapacity, if he can properly be brought to trial by court-martial for the same acts or omissions which are alleged as evidence of the incapacity justifying his retirement. (1908) 27 Op. Atty. Gen. 14.

Incapable of performing duties of office.—An officer of the Army, found by a retiring board, duly organized and convened, to be "incapable of performing the duties of his office," may be, and ought to be, retired, without regard to the causes which may have led to such incapacity on his part. But to be "incapable" the officer must be either no longer responsible for his own actions, or subject to infirmities or disabilities which make the reasonable fulfillment of his military duties impossible for him, notwithstanding an honest desire and firm purpose on his part to fully discharge them. Even though such officer display impatience or irritability, imperfect control of his temper, indolence, indecision, and want of alertness in the performance of his duties to such an extent as to destroy or greatly impair his usefulness as an officer, he does not thereby necessarily become incapable of discharging his duties in such a sense as to justify his retirement. (1908) 27 Op. Atty. Gen. 14; (190) Id. 163.

Willful failure to discharge duty.—The punishment of an officer of the Army for willful failure to discharge his duty can not

be legally effected through the agency of a retiring board. (1908) 27 Op. Atty. Gen. 14.

Objections to promotion.—Objections to the promotion of an officer of the Army constitute no ground for retiring him from service, unless resulting in the actual incapacity contemplated by the above-named sections. (1909) 27 Op. Atty. Gen. 163.

Effect of retirement in general.—It was not the intention of the statute relating to the retirement of Army officers to place retired officers wholly out of the service. *Tyler v. U. S.* (1880), 16 Ct. Cl. 223.

Status of retired officers in general.—An officer placed on the retired list is still an officer of the United States. There is a clear distinction between officers retired from active service, whose names remain on the Army Register, and those wholly retired, whose names are dropped from the Register, and who are no longer officers of the United States. In *re Winthrop* (1806), 31 Ct. Cl. 35.

Wholly retired.—To be "wholly retired" is to be put out of the Army and out of office. Upon an order of the President, approving a report, and "wholly retiring" an officer, there is in law and in fact a vacancy, the legal status of the officer becoming that of a private citizen. And the nomination and confirmation of an officer as the successor of one "wholly retired" operate in law to supersede the retired officer, who thereby ceases to have any connection with the Army. But where an officer, illegally placed on the retired list by the President, has been subject to the disqualifications of the position, he must be regarded as an officer de facto. *Miller v. U. S.* (1884), 10 Ct. Cl. 338.

But see 16 Op. Atty. Gen. 20.

Officer wholly retired becomes a civilian.—An officer, on being wholly retired, becomes a civilian, and can be readmitted to the service only by a new appointment. But he can not be appointed at once to the retired list. A civilian can not be appointed as a retired officer. He must first

be appointed an officer on the active list, of a certain rank. None but a commissioned officer on the active list of the Army can be placed on the retired list. 10 Op. Atty. Gen. 202.

Determination by President.—The jurisdiction of the President over the relations of an officer to the Army, and his right to determine whether an officer incapacitated for service be placed on the retired list, or wholly retired are created by statute, and the President's authority therein is wholly dependent upon the letter of positive enactment. The President has the power, upon the report of a retiring board, to retain the report of a retiring board, to retain the officer in active service, retire him from active service, or wholly retire him. Such power is not a continuing one, and is performed to the extent of its existence by the one act of the President, and, having once "determined," he can not review his decision, nor correct an error of judgment

therein. *McBlair v. U. S.* (1884), 10 Ct. Cl. 328. And see (1888) 10 Op. Atty. Gen. 203; (1873) 15 Op. Atty. Gen. 442.

The finding of a retiring board, approved by the President, is conclusive as to the facts. The board finds the facts and the President approves or disapproves the finding, but the law does not empower him to modify the finding or to substitute a different one. There is here a judicial power vested in the two, and not in the President acting singly, and when the power has once been fully exercised it is exhausted as to the case. (*Dig. Opin. J. A. G.*, 987; *U. S. v. Burchard*, 125 U. S., 179; *U. S. v. Miller*, 19 Ct. Cls., 338.)

When the President has once acted upon the findings of a retiring board his power over the case is exhausted and his subsequent orders in respect to such officer are void for want of authority. (19 Opin. Atty. Gen., 202.)

2408. Physically disabled officers not on limited retired list.— * * * *And provided further*, That hereafter officers retired for physical disability shall not form part of the limited retired list: * * * *Act of Sept. 17, 1919 (41 Stat. 286).*

2409. Retirement for disability incident to service.—When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of service, and such decision is approved by the President, said officer shall be retired from active service and placed on the list of retired officers. *R. S. 1251.*

See also 2283, ante, and 2441, post.

2410. Retirement of disabled provisional officers.—Should any such officer during such provisional period of two years become incapable of performing the duties of his office by reason of physical incapacity resulting from an incident of service, he shall be retired from active service by the President upon the actual rank held by him at the time of retirement in the manner provided by law for the retirement of permanent officers of the Regular Army, and provisional officers retired under the provisions of this section shall be in addition to the number of the officers of the Army on the retired list now fixed by law. *Act of July 9, 1918 (40 Stat. 852), amending sec. 23, act of June 3, 1916 (39 Stat. 181).*

But see 2268, ante.

2411. Retirement for disability not incident to service.—When the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retired from the service, as the President may determine. The names of officers wholly retired from the service shall be omitted from the Army Register. *R. S. 1252.*

Notes of Decisions.

Retired from active service, and wholly retired.—The statutes make a clear distinction between officers retired from active

service whose names remain on the Army Register and those wholly retired, whose names are dropped from the Register and

who are no longer officers of the United States. In re Winthrop (1895), 31 Ct. Cl. 35.

To be "wholly retired," in accordance with the terms of this section, is to be put

out of the Army and out of office. An officer wholly retired becomes a civilian, and can be readmitted to the service only by a new appointment. *Miller v. U. S.*, 19 Ct. Cls., 338.

2412. Transfer from limited to unlimited retired list.—That when officers who have been placed on the limited retired list as established by section seven, chapter two hundred and sixty-three, page one hundred and fifty, volume twenty, United States Statutes at Large, shall have attained the age of sixty-four years they shall be transferred from said limited retired list to the unlimited list of officers retired by operation of law because of having attained said age of sixty-four years. * * * *Act of Feb. 16, 1891 (26 Stat. 763).*

See note to 2413, post.

2413. Limited retired list.—The whole number of officers of the Army on the retired list shall not at any time exceed three hundred, and any less number to be allowed thereon may be fixed by the President in his discretion. *R. S. 1258.*

* * * And the limited retired list shall hereafter consist of three hundred and fifty instead of four hundred, as now fixed by law: *Provided*, That officers who have been placed on the retired list by special authority of Congress shall not form part of the limited retired list established by this act. *Act of Feb. 16, 1891 (26 Stat. 763).*

The limited retired list was established by sec. 16, of the act of Aug. 3, 1861 (12 Stat. 289), which provided that the number of officers retired in accordance with the authority conferred by the act should not, at any time, exceed 7 per cent of the whole number of officers of the Army as fixed by law. This limitation was incorporated in *R. S. 1258*, above. By sec. 5, of the act of July 15, 1870 (16 Stat. 317) sec. 1258, *R. S.*, the number of officers to be borne upon the retired list was to be determined by the President, in his discretion, but was not to exceed 300. By sec. 7, of the act of July 17, 1878 (20 Stat. 150), the number of retired officers was increased to 400. By the act of Feb. 16, 1891 (26 Stat. 763), the number was reduced and fixed at 350, the number now authorized by law. For statutes in relation to the retirement of officers found physically disqualified for promotion by boards of examination see 2283, 2287, ante. The unlimited list was established by act of June 30, 1882, ante, 2403.

But see 2408, ante.

2414. Retirement after 45 years' service or at the age of 62.—When any officer has served forty-five years as a commissioned officer, or is sixty-two years old, he may be retired from active service at the discretion of the President. *R. S. 1244.*

Notes of Decisions.

Reinstatement.—An Army officer who has been retired from active service by the President under this section can not be reinstated on the active list, except by a new appointment with the advice and consent of the Senate, and where vacancies on the

active list exist which may lawfully be filled. (1869) 13 Op. Atty. Gen. 99. He can not be reinstated by an order of the President, though the vacancy caused by his retirement may not have been filled. (1870) 13 Op. Atty. Gen. 209.

2415. Officers entitled to a hearing before being retired.—Except in cases where an officer may be retired by the President upon his own application, or by reason of his having served forty-five years, or of his being sixty-two years old, no officer shall be retired from active service, nor shall an officer, in any case, be wholly retired from the service, without a full and fair hearing before an Army retiring board, if, upon due summons, he demands it. *R. S. 1253.*

Notes of Decisions.

Full and fair hearing.—When the President approves and acts upon the report of a retiring board, he thereby determines that the officer has had "a full and fair hearing." *Miller v. U. S.* (1884), 19 Ct. Cl. 338.

Remand to board.—This section does not

authorize the President to send a case back to a retiring board, if he has once approved and acted upon its report. *Miller v. U. S.* (1884), 19 Ct. Cl. 338.

See also notes to 2407, ante.

2416. Retirement of general officers.— * * * *Provided further*, That hereafter no officer holding a rank above that of colonel shall be retired except for disability or on account of having reached the age of sixty-four years until he shall have served at least one year in such rank. *Act of June 12, 1906 (34 Stat. 245).*

See 2422, post.

2417. Retirement of veterinarians.— * * * *Provided*, That hereafter so much of section twenty, of the Act approved February second, nineteen hundred and one, as provides that veterinarians shall receive the pay and allowances of second lieutenants, mounted, shall be interpreted to authorize their retirement under the laws governing the retirement of second lieutenants. *Act of Mar. 3, 1911 (36 Stat. 1042).*

But see 553 and 588, ante.

2418. Retirement of officers who served with Isthmian Canal Commission.—That at any time after the passage of this Act any officer of the Army or Navy to be benefited by the provisions of this Act may, on his own application, be retired by the President at seventy-five per centum of the pay of the rank upon which he is retired. *Sec. 6, act of March 4, 1915 (38 Stat. 1191).*

2419. Promotion of retired officers who commanded volunteers during the Civil War.—That the President be, and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, any brigadier general of the Army on the retired list who has held the rank and command of major general of Volunteers and performed the duties incident to that grade in time of actual warfare, and has been honorably discharged and who served with credit in the Regular or Volunteer forces during the Civil War prior to April ninth, eighteen hundred and sixty-five, to the grade of major general in the United States Army and place him on the retired list with the pay of brigadier general on the retired list; and any officer now on the retired list of the Army who served with credit for more than two years as a commissioned officer of Volunteers during the Civil War prior to April ninth, eighteen hundred and sixty-five, and who subsequently served with credit for more than forty years as a commissioned officer of the Regular Army, including service in command of troops in five Indian campaigns, the War with Spain, and the Philippine insurrection, and to whom the Congressional medal of honor for most distinguished conduct in action has been twice awarded, and who has also been brevetted for conspicuous gallantry in action, and place him on the retired list of the Army with the rank and retired pay of one grade above that actually held by him at the time of his retirement from active service in the Regular Army. *Act of Mar. 4, 1915 (38 Stat. 1084).*

Special temporary provisions for the selection of two brigadier generals of Volunteers to be brigadier generals of the Regular Army, and their retirement, and for the selection from the retired list of an officer of the Regular Army not above the rank of brigadier general, to be major general on the retired list, were made by sec. 23, act of Feb. 2, 1901 (31 Stat. 756).

2420. Status of retired officers.—Officers retired from active service shall be withdrawn from command and from the line of promotion. *R. S. 1255.*

Notes of Decisions.

Effect of retirement.—An Army officer is not discharged from service by his retirement; nor is he out of the service thereby. *U. S. v. Gillmore* (C. C. 1911), 189 Fed. 761; *Tyler v. U. S.* (1880), 16 Ct. Cl. 223.

See also notes to 2407, ante.

Officers on retired list.—Officers on the retired list are a part of the Army. *U. S. v. Tyler* (1881), 103 U. S. 244, 245, 26 L.

Ed. 985; *Wood v. U. S.* (1882), 2 Sup. Ct. 551, 554, 107 U. S. 414, 27 L. Ed. 542; *Flower v. U. S.* (1895), 31 Ct. Cl. 35. And no one can be placed upon the retired list who is not an officer appointed in the manner required by Const. art. 2, sec. 2, cl. 2. *Wood v. U. S.* (1882), 2 Sup. Ct. 551, 554, 107 U. S. 414, 27 L. Ed. 542.

2421. Rights and liabilities of retired officers.—Officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired. They shall continue to be borne on the Army Register, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach thereof. *R. S. 1256.*

Officers and men on the retired list were made subject to the Articles of War by art. 2 thereof.

A. W. 2, chap. 52, post.

The pay and allowances of retired officers were prescribed by *R. S. 1274* and 1275, ante, 1643, 1647.

Retired officers may be assigned to duty as provided in 2426-2442, post.

Retired officer are specifically excepted from the provision forbidding all persons holding an office, the salary or annual compensation attached to which amounts to \$2,500, from holding any other lucrative office, contained in 72, ante.

See also 1649, 1650, 2387, ante.

Notes of Decisions.

Rights in general.—Persons who served during the Rebellion in the Army of the United States as officers in the Volunteer service, and have been honorably mustered out of such service, are entitled to bear the official title, and, upon occasions of ceremony, to wear the uniform of the highest grade they have held in the Volunteer service. (1897) 21 Op. Atty. Gen. 579.

Court-martial.—A retired officer is subject to trial by court-martial, and a court-

martial has jurisdiction of offenses committed after the officer was retired. *Runkle v. U. S.* (1884), 19 Ct. Cl. 396.

Assignment of unearned retired pay.—The assignment of the unearned half p. y of a retired Army officer will not be enforced, as against public policy; he being still subject to military orders, under this section. *Schwenk v. Wyckoff* (1890), 46 N. J. Eq. 560, 20 Atl. 259.

2422. Officers retired on actual rank.—Officers hereafter retired from active service shall be retired upon the actual rank held by them at the date of retirement. *R. S. 1254.*

* * * If any officer of the Regular Army is retired while holding a temporary appointment made under the provisions of this paragraph, he shall have the rank of such temporary grade, and his retired pay shall be computed upon the pay of that grade. *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 787).*

Notes of Decisions.

Rank on retirement.—Under act of July 28, 1866 (14 Stat. 337), a colonel of Cavalry was retired, with the rank and pay of a major general. By act of Mar. 3, 1875

(18 Stat. 512), his retired rank and pay were reduced to those of a brigadier general. Held, that his retired rank of major general did not confer on him the office of

a major general, and the Congress had power to change his retired rank and pay. *Wood v. U. S.* (1882), 2 Sup. Ct. 551, 107 U. S. 414, 27 L. Ed. 542.

An Army officer who accepts a recess promotion, and thereafter becomes eligible for

retirement by reason of age, before the adjournment of Congress, and before the appointment is acted upon by the Senate, is entitled to the rank of his new appointment on his retirement. (1912) 25 Op. Atty. Gen. 598.

2423. Disabled officers retired on actual rank.—That all officers of the Army who have been heretofore retired by reason of disability arising from wounds received in action shall be considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay hereafter accordingly; and this section shall be taken and construed to include those now borne on the retired list placed upon it on account of wounds received in action: *Provided*, That no part of the foregoing act shall apply to those officers who had been in service as commissioned officers twenty-five years at the date of their retirement; nor to those retired officers who had lost an arm or leg, or has an arm or leg permanently disabled by reason of resection, on account of wounds, or both eyes by reason of wounds received in battle; and every such officer now borne on the retired list shall be continued thereon notwithstanding the provisions of section two chapter thirty-eight act of March thirty, eighteen hundred and sixty-eight; *and be it also provided* that no retired officer shall be affected by this act, who has been retired or may hereafter be retired on the rank held by him at the time of his retirement; * * * *Sec. 2, act of Mar. 3, 1875 (18 Stat. 512).*

Sec. 2, act of Mar. 30, 1868, referred to in this section, providing that any officer of the Army or Navy who should accept or hold any appointment in the diplomatic or consular service should be considered as having resigned, was incorporated in R. S. 1223, 2374, ante.

The pay of any officer retained on the retired list under this act was not to be suspended or withheld, notwithstanding he accepted and held a diplomatic or consular office, by a provision of act of Mar. 3, 1891 (26 Stat. 872).

Notes of Decisions.

Construction of section in general.—This section should be construed to have a prospective effect only. (1890) 19 Op. Atty. Gen. 609.

Wounds received in battle.—An aggravation of a disease from jolting in a saddle during active service is not "wounds received in battle." Sec. 32, act of July 28, 1866 (14 Stat. 337). (1881) 17 Op. Atty. Gen. 7.

Decision of examining board as to.—The opinion and recommendation of an examining board, made under a misconception of the law, can not control distinct statutory provisions, limiting retirements to instances where the disability was "occasioned by wounds received in battle." (1881) 17 Op. Atty. Gen. 7.

Arm or leg permanently disabled by resection.—The word "resection," as used in the first proviso to this section, is a surgical term, signifying the removal by excision of dead or diseased bone—more especially the removal of such bone, in that way, from

the articular extremities or the unconsolidated extremities of fractured bones. In order to bring a case within the terms of the proviso, the essential circumstances required are: (1) A previous wound, causing some portion of the bone to become diseased or dead; (2) thereby necessitating a cutting off and removal of the dead or diseased part, which is accomplished; (3) whereby the limb is permanently disabled. It is sufficient if the disability is in part approximately attributable to the resection, though this be proportionately less than what is due to other contributory causes. (1876) 15 Op. Atty. Gen. 83.

A partial resection of an arm or leg on account of wounds received in battle, where the operation is followed by permanent disability of the limb, and the disability is partly owing to such operation, suffices to bring a case within the proviso. (1877) 15 Op. Atty. Gen. 199.

Where an officer was permanently disabled of a limb mainly from the effects of

a wound received in battle, and a doubt exists whether part of the disability, at least, was not caused by a resection on account of the wound, such officer is entitled to the benefit of the doubt, upon the ground that this section operating as 't does to take away rights previously granted by law, should not be made to affect those as to whom its application is doubtful. (1876) 15 Op. Atty. Gen. 88.

Every such officer.—The words "every such officer," as used in the first proviso of this section, cover all retired officers who are included within the preceding part of the same proviso, but do not apply to others. (1877) 15 Op. Atty. Gen. 407.

Change in rank.—The retirement of a colonel of Cavalry in June, 1868, under sec. 32, act of July 28, 1868 (14 Stat. 337), with the rank and retired pay of a major general, because that was the rank of the command held by him when he was wounded, did not confer on him the office of a major general, and Congress had power to change his retired rank and pay to those of a brigadier general under this section, that being the actual rank held by him when he was wounded. *Wood v. U. S.* (1882), 2 Sup. Ct. 551, 554, 107 U. S. 414, 27 L. Ed. 542.

2424. Rank on retirement of the head of a staff corps or department.— * * * And any officer now holding office in any corps or department who shall hereafter serve as chief of a staff corps or department and shall subsequently be retired, shall be retired with the rank, pay, and allowances authorized by law for the retirement of such corps or department chief: * * * *Sec. 26, act of Feb. 2, 1901 (31 Stat. 755).*

But see 2425, post.

2425. Rank on retirement of the chief of a branch.— * * * Any officer who shall have served four years as chief of a branch, and who may subsequently be retired, shall be retired with the rank, pay and allowances authorized by law for the grade held by him as such chief. * * * *Sec. 4c, added to the act of June 3, 1916, by sec. 4, act of June 4, 1920 (41 Stat. 762).*

Notes of Decisions.

Navy retired pay.—The act of May 13, 1918, 35 Stat. 128, which provides "that any officer of the Navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired, shall be retired with the rank, pay, and allowances authorized by

law for the retirement of such bureau chief," was enacted for the benefit of bureau chiefs who are placed on the retired list while so serving, and does not apply to an officer who having served as such is retired after relinquishing said office. *Stokes v. U. S.* (1919), 54 Ct. Cl. 70.

2426. Detail of retired officers for duty at schools.—That section twelve hundred and twenty-five of the Revised Statutes, concerning the detail of officers of the Army and Navy to educational institutions be, and the same is hereby, amended so as to permit the President to detail under the provisions of that Act, and in addition to the details of the officers of the Army and Navy now authorized to be detailed under the existing provisions of said Act, such retired officers and noncommissioned officers of the Army and Navy of the United States as in his judgment may be required for that purpose to act as instructors in military drill and tactics in schools in the United States and Territories where such instructions shall have been authorized by the educational authorities thereof, and where the services of such instructors shall have been applied for by said authorities. *Sec. 1, act of April 21, 1904 (33 Stat. 225).*

That no detail shall be made under this Act to any school unless it shall pay the cost of commutation of quarters of the retired officers or noncommissioned officers detailed thereto and the extra-duty pay to which they may be entitled by law to receive for the performance of special duty: *Provided*, That no detail shall be made under the provisions of this Act unless the officers and noncom-

missioned officers to be detailed are willing to accept such position: *Provided further*, That they shall receive no compensation from the Government other than their retired pay. *Sec. 2, act of April 21, 1904 (33 Stat. 225).*

* * * *Provided further*, That no officer on the active list shall be detailed for recruiting service or for duty at schools and colleges, not including schools of the service, where officers on the retired list can be secured who are competent for such duty: * * * *Act of Sept. 17, 1919 (41 Stat. 286).*

R. S. 1225, as amended by act of Sept. 26, 1888, mentioned in this act, is set forth, ante. 2366.

But see 1679, ante.

2427. Detail of a retired officer as president or professor of a college.—That upon the application of any college, university, or institution of learning incorporated under the laws of any State within the United States, having capacity at the same time to educate not less than one hundred and fifty male students, the President may detail an officer of the Army on the retired list to act as president, superintendent, or professor thereof; and such officer may receive from the institution to which he may be detailed the difference between his retired and full pay, and shall not receive any additional pay or allowance from the United States. * * * *Act of May 4, 1880 (21 Stat. 113).*

* * * *Provided*, That nothing in the act entitled "An Act to increase the number of officers of the Army to be detailed to colleges," approved November third, eighteen hundred and ninety-three, shall be so construed as to prevent, limit, or restrict the detail of retired officers of the Army at institutions of learning under the provisions of section twelve hundred and sixty, Revised Statutes, and the Act making appropriations for the support of the Army, and so forth, approved May fourth, eighteen hundred and eighty, nor to forbid the issue of ordnance and ordnance stores, as provided in the Act approved September twenty-sixth, eighteen hundred and eighty-eight, amending section twelve hundred and twenty-five, Revised Statutes, to the institutions at which retired officers may be so detailed; and said act of November third, eighteen hundred and ninety-three, and said act of May fourth, eighteen hundred and eighty, shall not be construed to allow the full pay of their rank to retired officers detailed under said section twelve hundred and sixty, Revised Statutes, and said act of May fourth, eighteen hundred and eighty. *Act of Aug. 6, 1894 (28 Stat. 235).*

Act of Nov. 3, 1893, referred to in this provision, is set forth, 2366, ante, and the provisions of act of Sept. 26, 1888, amending R. S. 1225, are set forth, 866, ante.

2428. Detail of a retired officer as professor upon his own application.—Any retired officer may, on his own application, be detailed to serve as professor in any college. *R. S. 1260.*

Section 1260 is amended by adding at the end of the section the following:

"But while so serving, such officer shall be allowed no additional compensation." *Act of Feb. 27, 1877 (19 Stat. 243), amending R. S. 1260.*

Notes of Decisions.

Additional compensation.—This section | United States, not from the colleges.
refers to additional compensation from the | (1893) 20 Op. Atty. Gen. 687.

2429. Detail of retired officers to duty at the Soldiers' Home.—Retired officers of the Army may be assigned to duty at the Soldiers' Home, upon a selection by

the commissioners of that institution, approved by the Secretary of War; and a retired officer shall not be assignable to any other duty. *R. S. 1259.*

Section twelve hundred and fifty-nine is amended by adding at the end of the section the following:

"Provided, That they receive from the Government only the pay and emoluments allowed by law to retired officers." Act of February 27, 1877 (19 Stat. 243), amending R. S. 1259.

Sec. 2, act of Jan. 21, 1870 (16 Stat. 62). Res. Apr. 6, 1870, No. 32 (16 Stat. 372). Above limitation of details has been superseded as set forth in 2426-2428, ante, and 2430-2444, post.

Notes of Decisions.

Approval of selection.—The Secretary of War may approve or disapprove of the selection made by the commissioners. (1882) 17 Op. Atty. Gen. 449.

Duties that may be assigned.—A retired Army officer may be employed by the War Department to supervise work where he could not have been assigned to that duty. *Yates v. U. S.* (1890), 25 Ct. Cl. 296.

Other duty already assigned.—This section held not to require the amendment of

the appointment held by a retired Army officer as agent in charge of river and harbor work at Wilmington, Del., or that he be relieved from that work. (1889) 19 Op. Atty. Gen. 283.

Pay of officers assigned to Soldiers' Home.—A retired officer assigned to the Soldiers' Home is not entitled to receive from the Government more than the pay and emoluments allowed by law to retired officers. (1892) 20 Op. Atty. Gen. 350.

2430. Retired officers detailed to recruit volunteer forces.—That in the organization of a recruiting system, after Congress shall have authorized the raising of volunteer forces, the President is authorized to employ retired officers, non-commissioned officers, and privates of the Regular Army, either with their rank on the retired list or, in the case of enlisted men, with increased noncommissioned rank; or he may, by and with the advice and consent of the Senate, appoint and employ retired officers below the grade of colonel, with increased volunteer commissioned rank not to exceed in the case of any officer one grade above that held by him upon the retired list, or retired enlisted men with volunteer commissioned rank not above the grade of first lieutenant: *Provided, That* retired officers and enlisted men while thus employed shall not be eligible for transfer to the field units, but shall receive the full pay and allowances of the respective grades in which they are serving, whether volunteer or regular, in lieu of their retired pay and allowances: *Provided further, That* upon the termination of the duty or, in case of those given volunteer rank, upon muster out as volunteers said retired officers and enlisted men shall revert to their retired status. *Sec. 11, act of Apr. 25, 1914 (38 Stat. 350).*

2431. Assignment of retired officers to active duty.— * * * and the Secretary of War may assign retired officers of the Army, with their consent, to active duty in recruiting, for service in connection with the organized militia in the several States and Territories upon the request of the governor thereof, as military attachés, upon courts-martial, courts of inquiry and boards, and to staff duties not involving service with troops; and such officers while so assigned shall receive the full pay and allowances of their respective grades. *Act of Apr. 23, 1904 (33 Stat. 264).*

* * * In time of war retired officers may be employed on active duty in the discretion of the President, and when so employed they shall receive the full pay and allowances of their grades. * * * *Sec. 127a, added to the act of June 3, 1916, by sec. 51, act of June 4, 1920 (41 Stat. 785).*

Notes of Decisions.

Termination of assignment to active duty.—A formal order detaching or relieving retired officers from active duty is not necessary. When the duty ends, the order assigning him to duty expires. Where a retired officer is appointed a member of a court-martial, his active service ends when the court is dissolved. *Gibson v. U. S.* (1912), 47 Ct. Cl. 554.

Right to full pay.—A retired officer of the Army is not entitled to the full pay and emoluments of his grade whilst not assigned to duty. (1866) 11 Op. Atty. Gen. 524.

Duty on court-martial.—Retired officers of the Army are officers in the military service of the United States within the meaning of A. W. 4, ch. 52, post, and an order assigning such officers to a court-martial was within the authority conferred upon the Secretary of War by this section. *Kahn v. Anderson* (1921), 254 U. S. —; 65 L. Ed. 288; *U. S. v. Tyler* (1881), 105 U. S. 244. See also notes to A. W. 3, ch. 52, post.

2432. Assignment to active duty of Class B officers.— * * * If an officer is thus retired before the completion of thirty years' commissioned service, he may be employed on such active duty as the Secretary of War considers him capable of performing until he has completed thirty years' commissioned service. * * * *Sec. 24b, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 773).*

2433. Detail of a retired officer as Adjutant-General of the District of Columbia Militia.—That the President of the United States may detail as Adjutant-General of the District of Columbia militia any retired officer of the Army who may be nominated to the President by the brigadier-general commanding the District of Columbia militia, said retired officer while so detailed to have the active service pay and allowances of his rank in the Regular Army. *Act of June 6, 1900 (31 Stat. 671).*

2434. Detail of retired officers to duty with the organized militia.— * * * *Provided,* That in addition to the detail of retired officers now authorized by law, it shall hereafter be lawful for the Secretary of War to detail, whenever in his judgment the public interests require it, not exceeding twenty retired officers for service in connection with the organized militia in the States or Territories, upon the request of the governor thereof, and such retired officers shall be entitled, while so employed, to receive the full pay and allowances of their respective grades. *Act of Mar. 2, 1903 (32 Stat. 932).*

But see 2353, ante.

2435. Detail of retired officer as post commander.— * * * *Provided,* That when by reason of the movement of troops a post is temporarily left without its regular garrison and with no commissioned officer except of the Medical Reserve Corps on duty thereat, the Secretary of War may assign a retired officer of the Army, with his consent, to active duty in charge of such post. The officer so assigned shall perform the duties of commanding officer and also any necessary staff duties at such post, and shall, while in the performance of such duties, receive the full pay and allowances of his grade, subject to the limitations imposed by the Act of March second, nineteen hundred and five, and the Act of June twelfth, nineteen hundred and six, which limitations shall include the grades of brigadier general, major general, and lieutenant general. *Act of Aug. 29, 1916 (39 Stat. 627).*

The provisions of act of Mar. 2, 1905, mentioned in this section, are set forth 1652, ante. The provisions of act of June 12, 1906, also mentioned, were superseded by act of July 9, 1918 (40 Stat. 890), amending sec. 24, act of June 3, 1916 (39 Stat. 183), stricken out by sec. 24, act of June 4, 1920 (41 Stat. 771). See 1651, ante.

2436. Pay of retired artillery officers assigned to active duty.— * * * *Provided further*, That in determining the rights of officers in the last proviso of section twenty-four of said national defense Act, officers retired before the separation of the Field Artillery from the Coast Artillery shall be regarded as having belonged to the Field Artillery: * * * *Act of Aug. 29, 1916 (39 Stat. 623).*

See note to 2435, ante. See also 2995, post.

2437. Detail of retired officers as acting quartermasters.— * * * *Provided*, That assignments which have been, or may hereafter be made, of retired officers of the Army to active duty as acting quartermasters shall be regarded as assignments to staff duties not involving service with troops within the meaning of the Act of Congress approved April twenty-third, nineteen hundred and four. *Act of May 12, 1917 (40 Stat. 48).*

The provision referred to is set forth 2431, ante.

2438. Assignment of retired Engineer officers to active duty.—That when retired officers of the Army, any portion of whose active service was in the Corps of Engineers, are called back into active service they shall be eligible to fill any position required by law to be filled by an officer of the Corps of Engineers. *Joint res. 6, June 15, 1917 (40 Stat. 231).*

2439. Status of retired officers assigned to active duty.— * * * That when any retired officer of the Army is, in the discretion of the President, employed on active duty and assigned to duty in an arm, corps, department, or organization, he shall, for all purposes, except promotion, be considered an officer of such arm, corps, department, or organization while so serving, and shall be an extra number therein. * * * *Chap. XX, act of July 9, 1918 (40 Stat. 893).*

But see 2299, ante.

2440. Transfer of retired officers to the active list.— * * * *Provided*, That hereafter the President be, and he is hereby, authorized, by and with the advice and consent of the Senate, to transfer to the active list of the Army any officer under fifty years of age and with rank not above that of captain who may have been transferred heretofore or who may be transferred hereafter for physical disability from the active to the retired list of the Army by the action of any retiring board: *Provided*, That such officer shall be transferred to the place on the active list which he would have had if he had not been retired, and shall be carried as an additional number in the grade to which he may be transferred or at any time thereafter promoted: *Provided further*, That such officer shall stand a satisfactory medical and professional examination for promotion as now provided for by law: *Provided further*, That the President be, and he is hereby, authorized within two years of the approval of this Act, by and with the advice and consent of the Senate, to transfer to the active list of the Army any officer who may have been transferred heretofore for physical disability from the active to the retired list of the Army by the action of any retiring board: * * * *Provided further*, That any officer who may have already been transferred from the retired list to the active list, shall receive the benefits of this Act. *Act of Mar. 4, 1915 (38 Stat. 1068-1069).*

* * * Former officers of the Regular Army and retired officers may be reappointed to the active list, if found competent for active duty, and shall be commissioned in the grades determined by the places assigned to them on the

promotion list under the provisions of section 24a hereof. * * * *Sec. 24c, added to the act of June 3, 1916, by sec. 24, act of June 4, 1920 (41 Stat. 774).*

But see 2282, ante.

2441. Return to active duty of officers retired for disability.—That the Secretary of War shall make a list of all officers of the Army who have been placed on the retired list for disability and shall cause such officers to be examined at intervals as may be advisable, and such officers as shall be found to have recovered from such disabilities or to be able to perform service of value to the Government sufficient to warrant such action shall be assigned to such duty as the Secretary of War may approve. *Act of Aug. 29, 1916 (39 Stat. 629)*

2442. Transfer to the active list of retired officers who served with the Isthmian Canal Commission.—That hereafter the President be, and he is hereby, authorized, within one year of the approval of this Act, by and with the advice and consent of the Senate, to transfer, upon application, to the active list of the Army any officer under fifty years of age who may have been transferred heretofore from the active to the retired list of the Army under the Act to provide for recognizing the services of certain officers of the Army, Navy, and Public Health Service for their services in connection with the construction of the Panama Canal, and for other purposes, approved March fourth, nineteen hundred and fifteen: *Provided*, That such officers shall take rank at the foot of the respective grades which they held at the time of their retirement and shall be carried as an additional number in the grade to which he may be transferred or at any time thereafter promoted, and shall be promoted on the same date as the officer next above him in rank, and shall be commissioned in the arm or department of the Army from which he was retired: *Provided further*, That such officer shall stand a satisfactory medical examination, and when promoted shall stand the medical and professional examinations provided for by law: *And provided further*, That any officer transferred to the active list under this Act shall not again be entitled to the benefits of the Panama Canal Act described above, except when retired for age or for physical disability incurred in the line of duty. *Act of Feb. 23, 1917 (39 Stat. 937).*

But see 2262, 2282, ante.

2443. Employment of retired officers of Army or Navy on river and harbor improvement.—That section two of the Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes, approved July thirty-first, eighteen hundred and ninety-four, shall not be so construed as to prevent the employment of any retired officer of the Army or Navy to do work under the direction of the Chief of Engineers of the United States Army in connection with the improvement of rivers and harbors of the United States, or the payment by the proper officer of the Treasury of any amounts agreed upon as compensation for such employment. *Sec. 7, act of June 3, 1896 (29 Stat. 235).*

For sec. 2, act of July 31, 1894 (28 Stat. 205), see 72, ante.

2444. Assignment to active duty as members of board of road commissioners for Alaska.—* * * *Provided*, That hereafter the Secretary of War may, in his discretion, assign suitable retired officers of the Army to active duty as members of the board of road commissioners of Alaska, and in the case of any officer so assigned the provisions of so much of the Act of Congress approved April twenty-third, nineteen hundred and four, entitled "An Act making appro-

priations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and five, and for other purposes," as relates to the assignment of retired officers to active duty shall apply. * * * *Act of March 8, 1911 (36 Stat. 1052).*

The provisions of act Apr. 23, 1904, mentioned in this provision, are set forth, 2431, ante.

2445. National defense act not to effect separation.—Nothing in this Act shall be held or construed so as to discharge any officers from the Regular Army or to deprive him of the commission which he now holds therein. *Sec. 127, act of June 3, 1916 (39 Stat. 217).*

2446. Dismissal of officers absent without leave.—The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for re-appointment. And no officer in the military, or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof. *R. S. 1229.*

That the President be, and he is hereby, authorized to drop from the rolls of the army any officer who is absent from duty three months without leave, or who has been absent in confinement in a prison or penitentiary for more than three months after final conviction by a civil court of competent jurisdiction; and no officer so dropped shall be eligible for reappointment. *Act of Jan. 19, 1911 (36 Stat. 594).*

Similar provision appears in A. W. 118, ch. 52, post.

Notes of Decisions.

What constitutes a dismissal.—The acceptance of a resignation, and the appointment of an officer to fill the vacancy created by such resignation, is not a dismissal within the meaning of this section. *Blake v. U. S. (1878), 14 Ct. Cl. 462.*

Where an Army officer was sentenced to dismissal from the service, and the sentence, without having been approved by the President, was carried into effect under orders of the War Department, held, that the subsequent recognition by the President of the vacancy by making an appointment or nomination of a person to fill the place of such officer, operated as a confirmation of the sentence and orders. (1879) 16 Op. Atty. Gen. 298.

Construction of section in general.—The first part of R. S. 1229, which authorizes the President to drop from the rolls for desertion any officer absent from duty three months without leave, was taken from sec. 17, act of July 13, 1870. The part which prohibits the dismissal from service, in time of peace, of any officer, except pursuant to the sentence of a court-martial, was taken from sec. 5, act of July 13, 1866. Under sec. 12, act of July 17, 1862 (12 Stat. 596), the President had authority "to dis-

miss and discharge from the military service either in the Army, Navy, Marine Corps, or Volunteer force, in the United States service, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismissal would promote, the public service." Sec. 12, act of Mar. 3, 1865 (13 Stat. 489), which was incorporated into R. S. 1230, post, 2447, gave an officer, dismissed by order of the President, the right to demand a court-martial, etc. As to whether the second half of R. S. 1229, and post, 2447, operated so as to make a dismissal by the President for desertion, as authorized by the first half of this section, inoperative without a court-martial, the Supreme Court of the United States, in 1880, held that the last half of R. S. 1229 did not take away from the President the power, with the advice and consent of the Senate, to supersede an officer in the military or naval service by the appointment of some one in his place, and that said provision only restricted the power of the President so as to prohibit him from summarily, in time of peace, dismissing officers, whenever in his judgment the interest of the service required it to be done, without the concurrence of the Sen-

ate. except in pursuance of the sentence of a court-martial, or in commutation thereof. In this decision of the Supreme Court the question of the power of the President to dismiss for desertion was not involved. See *Blake v. U. S.* (1880), 103 U. S. 227, 235, 26 L. Ed. 462. See, also, *Keyes v. U. S.* (1883), 3 Sup. Ct. 202, 204, 109 U. S. 336, 27 L. Ed. 954; *Mullan v. Same* (1891), 11 Sup. Ct. 788, 789, 140 U. S. 240, 35 L. Ed. 489; *Fletcher v. Same* (1891), 26 Ct. Cl. 541; *Newton v. U. S.* (1883), 18 Ct. Cl. 435; (1881) 17 Op. Atty. Gen. 13.

In *Fletcher v. U. S.* (1891), 26 Ct. Cl. 541, it was held that the second part of this section was founded on the constitutional power of Congress "to make rules for the Government and regulation of the land and naval forces," and was a restriction upon the power of the President.

Leave with void conditions.—Accepting a leave with the condition affixed that it

be without pay does not amount to absence without leave. *U. S. v. Andrews* (1916), 240 U. S. 90.

Determination of fact of desertion.—The jurisdiction to find the fact of desertion is vested in the President alone, and his decision can not be reviewed by the Court of Claims. *Newton v. U. S.* (1883), 18 Ct. Cl. 435.

Officer appointed during Senate recess.—An officer appointed and commissioned during a recess of the Senate comes within this section as to dismissal without court-martial. *O'Shea v. U. S.* (1893), 28 Ct. Cl. 392.

Cadets of Military Academy.—A cadet in the Military Academy at West Point is not an officer within the meaning of this section, and the President may dismiss him summarily, without the intervention of a court-martial. *Hartigan v. U. S.* (1905), 25 Sup. Ct. 204, 205, 196 U. S. 169, 49 L. Ed. 434, affirming (1903), 38 Ct. Cl. 346.

2447. Officers dismissed by the President may demand trial.—When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial, to try such officer on the charges on which he shall have been dismissed. And if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void. *R. S. 1230.*

Notes of Decisions.

Validity.—This section held unconstitutional and inoperative on two grounds: (1) That where an officer was dismissed from the Army in time of war by a valid order of the President, he may only be reappointed in the mode prescribed by the Constitution (*U. S. v. Corson* (1885), 114 U. S. 619, 622); and (2) It has been superseded by A. W. 118, enacted Aug. 29, 1916 (and reenacted with but the addition of one word, June 4, 1920), post ch. 52. *Wallace v. U. S.* (1920), 55 Ct. Cl. 396.

Scope and construction.—The phrase "any officer dismissed," being prospective only in its meaning, does not apply to an officer dismissed before the passage of the act. (1878) 16 Op. Atty. Gen. 599.

Time for application for court-martial.—A delay of nine years in asking for a trial by court-martial is unreasonable. *Newton v. U. S.* (1883), 18 Ct. Cl. 435.

2448. Restoration of dismissed officers.—No officer of the Army who has been or may be dismissed from the service by the sentence of a general court-martial, formally approved by the proper reviewing authority, shall ever be restored to the military service, except by a re-appointment confirmed by the Senate. *R. S. 1228.*

Notes of Decisions.

Restoration to rank.—The President, by and with the advice and consent of the Senate, may, by reappointment and commission, restore lost rank, including seniority, to an officer of the Army or Navy. (1856) 8 Op. Atty. Gen. 223. If, however, an officer's connection with the Army be en-

tirely and legally severed, the only way by which he can again enter the Army is by the appointment of the President, by and with the advice and consent of the Senate. And, so, where an officer has been summarily dismissed by order of the President, he can not be reinstated by the President's

revocation of the dismissal. *Montgomery v. U. S.* (1884), 19 Ct. Cl. 370. And see *McElrath v. U. S.* (1876), 12 Ct. Cl. 201.

Where the sentence of a legally constituted court-martial, dismissing an officer, has been approved by the reviewing authority and carried into execution, it can not afterwards be revised and annulled. (1882) 17 Op. Atty. Gen. 297.

Where the President is authorized by law to reinstate a discharged Army officer, he may do so without the advice and consent of the Senate. *Collins v. U. S.* (1879), 15 Ct. Cl. 22, reaffirming (1878) 14 Ct. Cl. 568.

The practical results of this statute, in connection with other provisions of law bearing upon the subject, are these: That in time of war the President may dismiss an officer from service at any moment and for any cause; that in time of peace he may dismiss him for cause, with the cooperation of a court-martial; or remove him

without cause, with the consent of the Senate. *Street v. U. S.*, 24 Ct. Cls. 248; *Blake v. U. S.*, 103 U. S. 227; *Fletcher v. U. S.*, 28 Ct. Cls. 541.

The President has the power to remove an officer of the Army by the appointment of another in his place, by and with the advice and consent of the Senate, and such power is not withdrawn by the provisions of sec. 5 of the act of July 13, 1866 (sec. 1229 R. S.), and this provision does not restrict the power of the President, by and with the advice and consent of the Senate, to displace officers of the Army and Navy by the appointment of others in their places. *Keyes v. U. S.*, 109 U. S. 330, 339; *Blake v. U. S.*, 103 U. S. 227; *McElrath v. U. S.*, 103 U. S. 426; *Mimmack v. U. S.*, 97 U. S. 426; *U. S. v. Corson*, 114 U. S. 619; *Montgomery v. U. S.*, 19 Ct. Cls. 370; *Bennett v. U. S.*, id. 379; *Palen v. U. S.*, id. 389; *McBlair v. U. S.*, id. 528; *Vanderslice v. U. S.*, id. 480; XV Opin. Att. Gen. 407.

2449. Discharge of officers from temporary appointments.— * * * The President is hereby authorized to discharge any officer from the office held by him under such appointment for any cause which, in the judgment of the President, would promote the public service; and the general commanding any division and higher tactical organization or territorial department is authorized to appoint from time to time military boards of not less than three nor more than five officers of the forces herein provided for to examine into and report upon the capacity, qualification, conduct, and efficiency of any commissioned officer within his command other than officers of the Regular Army holding permanent or provisional commissions therein. Each member of such board shall be superior in rank to the officer whose qualifications are to be inquired into, and if the report of such board be adverse to the continuance of any such officer and be approved by the President, such officer shall be discharged from the service at the discretion of the President with one month's pay and allowances. *Sec. 9, act of May 18, 1917 (40 Stat. 82).*

The above is sec. 9 of the selective service act. All emergency officers, except disabled emergency officers undergoing physical reconstruction, were required to be discharged, not later than Dec. 31, 1920, by 2267, ante.

CHAPTER 37.

RESERVE CORPS.

Officers' Reserve Corps:

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2450. Composition of the Officers' Reserve Corps.—For the purpose of providing a reserve of officers available for military service when needed, there shall be organized an Officers' Reserve Corps consisting of general officers, of sections corresponding to the various branches of the Regular Army, and of such additional sections as the President may direct. The grades in each section and the number in each grade shall be as the President may prescribe. * * * *Sec. 37, act of June 3, 1916 (39 Stat. 189), as amended by sec. 32, act of June 4, 1920 (41 Stat. 775).*

2451. Appointment of reserve officers.—* * * Reserve officers shall be appointed and commissioned by the President alone, except general officers, who shall be appointed by and with the advice and consent of the Senate. * * * Nothing in this Act shall operate to deprive a reserve officer of the reserve commission he now holds. * * * *Sec. 37, act of June 3, 1916 (39 Stat. 189), as amended by sec. 32, act of June 4, 1920 (41 Stat. 775–776).*

2452. Citizenship and age of reserve officers.—* * * In time of peace, a reserve officer must, at the time of his appointment, be a citizen of the United States or of the Philippine Islands, between the ages of twenty-one and sixty years. * * * *Sec. 37, act of June 3, 1916 (39 Stat. 190), as amended by sec. 32, act of June 4, 1920 (41 Stat. 776).*

2453. Age for discharge of reserve officers raised during the World War.—* * * During the existing emergency no member of the Officers' Reserve Corps shall be discharged by reason of reaching the age limits provided in section thirty-seven of the national defense Act approved June third, nineteen hundred and sixteen. *Act of Oct. 6, 1917 (40 Stat. 393).*

2454. Concurrent commission in National Guard.—* * * Any reserve officer may hold a commission in the National Guard without thereby vacating

his reserve commission. *Sec. 37, act of June 3, 1916 (39 Stat. 189), as amended by sec. 32, act of June 4, 1920 (41 Stat. 776).*

2455. Selection of reserve officers from graduates of the Reserve Officers' Training Corps.—The President alone, under such regulations as he may prescribe, is hereby authorized to appoint as a reserve officer of the Army of the United States any graduate of the senior division of the Reserve Officers' Training Corps who shall have satisfactorily completed the further training provided for in section 47a of this Act, or any graduate of the junior division who shall have satisfactorily completed the courses of military training prescribed for the senior division and the further training provided for in section 47a of this Act, and shall have participated in such practical instruction subsequent to graduation as the Secretary of War shall prescribe, who shall have arrived at the age of twenty-one years and who shall agree, under oath in writing, to serve the United States in the capacity of a reserve officer of the Army of the United States during a period of at least five years from the date of his appointment as such reserve officer, unless sooner discharged by proper authority: * * * *Sec. 47b, added to the act of June 3, 1916, by sec. 34, act of June 4, 1920 (41 Stat. 778).*

The above topic was treated by sec. 40, act of June 3, 1916 (39 Stat. 193), which has been stricken out by sec. 34, act of June 4, 1920, above cited.

2456. Selection of reserve officers from former commissioned officers.—* * * Any person who has been an officer of the Army at any time between April 6, 1917, and June 30, 1919, or an officer of the Regular Army at any time, may be appointed as a reserve officer in the highest grade which he held in the Army or any lower grade; any person now serving as an officer of the National Guard may be appointed as a reserve officer in his present or any lower grade; no other person shall in time of peace be originally appointed as a reserve officer of Infantry, Cavalry, Field Artillery, Coast Artillery, or Air Service in a grade above that of second lieutenant. In time of peace appointments in the Infantry, Cavalry, Field Artillery, Coast Artillery, and Air Service shall be limited to former officers of the Army, graduates of the Reserve Officers' Training Corps, as provided in section 47b hereof, warrant officers and enlisted men of the Regular Army, National Guard and Enlisted Reserve Corps, and persons who served in the Army at some time between April 6, 1917, and November 11, 1918. * * * *Sec. 37, act of June 3, 1916 (39 Stat. 189-190), as amended by sec. 32, act of June 4, 1920 (41 Stat. 776).*

Provided, further, That any former officer of the Regular Army, the Volunteer Army, the Organized Militia, or the National Guard, under the age of sixty-four years and who has resigned or been honorably discharged from the service after a total commissioned service of not less than three years in in either the Regular Army, the Volunteer Army, the Organized Militia, or the National Guard, may, upon such examination and within such age limits as may be prescribed by the President, be appointed and commissioned, in the discretion of the President, in any appropriate arm, staff corps, department or section of the Officers' Reserve Corps, with rank not more than one grade higher than any previously held by the officer in either of said forces, but in no case above that of lieutenant colonel. *Act of May 12, 1917 (40 Stat. 73).*

The repetition of the word "in," in the fourth line of the above statute, was a typographical error.

2457. Reserve officers selected from citizens qualified for duty in the staff corps.—That during the existing emergency the President is authorized, in addition to the grades now authorized, to appoint in the Officers' Reserve Corps and the National Army in the grades of second and first lieutenant in the Quartermaster Corps; second lieutenant in the Ordnance Corps and Signal Corps; second lieutenant, first lieutenant, and captain in The Adjutant General's Department, such citizens as shall be found physically, mentally, and morally qualified for appointment. * * * *Act of Oct. 6, 1917 (40 Stat. 393).*

2458. Contract surgeons eligible as reserve officers.— * * * *Provided*, That contract surgeons now in the military service who receive the favorable recommendation of the Surgeon-General of the Army shall be eligible for appointment in said reserve corps without further examination: * * * *Sec. 7, act of Apr. 23, 1908 (35 Stat. 68).*

2459. Period of service in the Officers' Reserve Corps.— * * * Appointment in every case shall be for a period of five years, but an appointment in force at the outbreak of war, or made in time of war, shall continue in force until six months after its termination. Any reserve officer may be discharged at any time in the discretion of the President. A reserve officer appointed during the existence of a state of war shall be entitled to discharge within six months after its termination if he makes application therefor. * * * *Sec. 37, act of June 3, 1916 (39 Stat. 190), as amended by sec. 32, act of June 4, 1920 (41 Stat. 776).*

2460. Vacant.

2461. Rank of reserve officers formerly of the emergency army of the World War.—That officers of the emergency Army appointed to the Officers' Reserve Corps may be appointed therein to the grade held by them in the emergency Army or next higher grade, as the Secretary of War may direct. *Act of July 11, 1919 (41 Stat. 129), making appropriations for the support of the Army.*

But see 2456, ante.

2462. Rank of medical reserve officers.—That the commissioned officers of the Medical Reserve Corps of the Regular Army, none of whom shall have rank above that of colonel, shall be proportionately distributed in the several grades as now provided by law for the Medical Corps of the Regular Army: *Provided*, That nothing in this Act shall be held or construed so as to discharge any officer of the Regular Army or deprive him of a commission which he now holds therein. *Act of July 9, 1918 (40 Stat. 866).*

2463. Promotions and transfers.— * * * Promotions and transfers shall be made under such rules as may be prescribed by the President, and shall be based so far as practicable upon recommendations made in the established chain of command, but no reserve officer shall be promoted to any grade in time of peace until he has held a commission for at least one year in the next lower grade. * * * *Sec. 37, act of June 3, 1916 (39 Stat. 190), as amended by sec. 32, act of June 4, 1920 (41 Stat. 776).*

2464. Assignment to units.— * * * So far as practicable, reserve officers shall be assigned to units in the locality of their places of residence. * * * *Sec. 37, act of June 3, 1916 (39 Stat. 190), as amended by sec. 32, act of June 4, 1920 (41 Stat. 776).*

2465. Reserve officers assigned to active duty.—To the extent provided for from time to time by appropriations for this specific purpose, the President may order reserve officers to active duty at any time and for any period; but except

In time of a national emergency expressly declared by Congress, no reserve officer shall be employed on active duty for more than fifteen days in any calendar year without his own consent. * * * *Sec. 37a, added to the act of June 3, 1916, by sec. 32, act of June 4, 1920 (41 Stat. 776).*

Sec. 39, act of June 3, 1916 (39 Stat. 190), provided for the call to active duty in time of war; but it was stricken out by sec. 32, act of June 4, 1920, cited above.

2466. Voluntary service by reserve officers.—*Provided further*, That section three of the Act approved February twenty-seventh, nineteen hundred and six, entitled, "An Act making appropriations to supply urgent deficiencies in the appropriations for the fiscal year ending June thirtieth, nineteen hundred and six, and for prior years and for other purposes," shall not be construed to prohibit the Secretary of War from accepting the gratuitous services of members of the Officers' Reserve Corps of the Army in the furtherance of the enrollment, organization, and training of the Officers Reserve Corps, the Reserve Officers' Training Corps, or the Enlisted Reserve Corps of the Army or in consultation upon matters relating to the military service. *Act of May 12, 1917 (40 Stat. 72), making appropriations for the support of the Army: Reserve corps.*

2467. Pay and allowances on active duty.— * * * A reserve officer shall not be entitled to pay and allowances except when on active duty. When on active duty he shall receive the same pay and allowances as an officer of the Regular Army of the same grade and length of active service, and mileage from his home to his first station and from his last station to his home, but shall not be entitled to retirement or retired pay. *Sec. 37a, added to the act of June 3, 1916, by sec. 32, act of June 4, 1920 (41 Stat. 776).*

2468. Leave of absence for Federal employees who are reserve officers.—*Provided further*, That all officers and employees of the United States or of the District of Columbia who shall be members of the Officers' Reserve Corps shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be ordered to duty with troops or at field exercises, or for instruction, for periods not to exceed fifteen days in any one calendar year. *Act of May 12, 1917 (40 Stat. 72), making appropriations for the support of the Army: Reserve Corps.*

2469. Federal employees restored to civil position after service as reserve officers.—*Provided further*, That members of the Officers' Reserve Corps who are in the employ of the United States Government or of the District of Columbia and who are ordered to duty by proper authority shall, when relieved from duty, be restored to the positions held by them when ordered to duty. *Act of May 12, 1917 (40 Stat. 72).*

2470. Retirement and pension rights of reserve officers.— * * * *Provided*, That no reserve officer appointed pursuant to this Act shall be entitled to retirement, or to retired pay, and shall be eligible for pension only for disability incurred in line of duty in active service or while serving with the Army pursuant to provisions of this Act. *Sec. 47b, added to the act of June 3, 1916, by sec. 34, act of June 4, 1920 (41 Stat. 778).*

The above topic was treated by sec. 53, act of June 3, 1916 (39 Stat. 190), which was stricken out by sec. 34, act of June 4, 1920, above cited.

2471. Retirement of medical reserve officers.—That any officer of the Medical Reserve Corps who shall have reached the age of seventy years, and whose

total active service in the Army of the United States, Regular or Volunteer, as such officer, and as contract or acting assistant surgeon, and as an enlisted man, shall equal forty years, may thereupon, in the discretion of the President, be placed upon the retired list of the Army with the rank, pay, and allowances of a first lieutenant. *Act of June 22, 1910 (36 Stat. 580), as amended by act of Mar. 4, 1911 (36 Stat. 1348).*

This act, as originally enacted, contained, after the words "enlisted man," the words "in the war of the rebellion." They were stricken out by amendment, as cited above.

2472. Period of service in the Enlisted Reserve Corps.— * * * The period of enlistment shall be three years, except in the case of persons who served in the Army, Navy, or Marine Corps at some time between April 6, 1917, and November 11, 1918, who may be enlisted for one year periods and who, in time of peace, shall be entitled to discharge within ninety days if they make application therefor. * * * *Sec. 55, act of June 3, 1916 (39 Stat. 195), as amended by sec. 35, act of June 4, 1920 (41 Stat. 780).*

2473. Qualifications for enlistment in the Enlisted Reserve Corps.—The Enlisted Reserve Corps shall consist of persons voluntarily enlisted therein. * * * Enlistments shall be limited to persons eligible for enlistment in the Regular Army who have had such military or technical training as may be prescribed by regulations of the Secretary of War. All enlistments in force at the outbreak of the war, or entered into during its continuation, whether in the Regular Army or the Enlisted Reserve Corps, shall continue in force until six months after its termination unless sooner terminated by the President. *Sec. 55, act of June 3, 1916 (39 Stat. 195), as amended by sec. 35, act of June 4, 1920 (41 Stat. 780).*

2474. Enlistment of dental students in the Enlisted Reserve Corps.—All regulations concerning the enlistment of medical students in the Enlisted Reserve Corps and their continuance in their college course while subject to call to active service, shall apply similarly to dental students. *Act of Oct. 6, 1917 (40 Stat. 397).*

2475. Organization of the Enlisted Reserve Corps.—The President may form any or all members of the Enlisted Reserve Corps into tactical organizations similar to those of the Regular Army, similarly armed, uniformed, and equipped, and composed so far as practicable of men residing in the same locality, may officer them by the assignment of reserve officers or officers of the Regular Army, active or retired, and may detail such personnel of the Army as may be necessary for the administration of such organizations and the care of Government property issued to them. *Sec. 55a, added to the act of June 3, 1916, by sec. 35, act of June 4, 1920 (41 Stat. 780).*

2476. Active service by the Enlisted Reserve Corps.—Members of the Enlisted Reserve Corps may be placed on active duty, as individuals or organizations, in the discretion of the President, but except in time of a national emergency expressly declared by Congress no reservist shall be ordered to active duty in excess of the number permissible under appropriations made for this specific purpose, nor for a longer period than fifteen days in any one calendar year without his own consent. While on active duty they shall receive the same pay and allowances as other enlisted men of like grades and length of service. *Sec. 55b, added to the act of June 3, 1916, by sec. 35, act of June 4, 1920 (41 Stat. 780).*

2477-2501. Vacant.—[These sections related to the Volunteer Army, provision for which is no longer made by law.]

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2502. The right to bear arms.—A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed. *Constitution of the United States, second amendment.*

Notes of Decisions.

Limitation to Federal Government.—This amendment is a limitation only on the powers of Congress and the National Government, and not upon that of the State. *Presser v. Illinois* (1886), 6 Sup. Ct. 580, 582, 584; 116 U. S. 252, 29 L. Ed. 615 [C. S. p. 14309].

This amendment means no more than that the right shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National Government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called, in *City of New York v. Miln* (1837), 11 Pet. 139, 9 L. Ed. 648, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States. *U. S. v. Cruikshank* (1875), 92 U. S. 542, 553, 23 L. Ed. 588.

The object of the clause relative to the right to bear arms has reference to the

perpetuation of free government, and is based on the idea that the people can not be effectually oppressed and enslaved who are not first disarmed. *Cockrum v. State* (1859), 24 Tex. 394, 401.

The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without and independent of an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the Government of every country. They can not be claimed as rights independent of law and are not privileges and immunities of citizens of the United States. State governments, unless restrained by their own constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States; and have also the power to con-

trol and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States. The exercise of this power, by the States, is necessary to the public peace, safety, and good order. *Presser v. Illinois*, 116 U. S. 252, 267; *U. S. v. Cruikshank*, 92 U. S. 542; *New York v. Miln*, 11 Pet. 102, 139.

"Arms" within purview of the constitutional provision.—The "arms" referred to are the arms of a militiaman or soldier, and they do not comprise dirks, bowie knives, etc. *English v. State* (1872), 35 Tex. 473, 14 Am. Rep. 374.

Exercise of State police power in general.—This provision was never intended to prevent a State from adopting such measures of police as might be necessary in order to protect the orderly and well-disposed citizens from the treacherous use of weapons not designed for any purpose of public defense, and used most frequently by evil disposed men who seek an advantage over their antagonists in the breaches of the peace which they are prone to provoke. *State v. Smith* (1856), 11 La. Ann. 683, 66 Am. Dec. 208.

Carrying or possessing arms without license.—A State statute prohibiting all bodies of men, except those comprising the

regularly organized militia of the State and United States troops, from associating, drilling, or parading with arms in any city without license from the governor of the State, is valid; the amendment not applying to the States. *Presser v. Illinois* (1886), 6 Sup. Ct. 580, 582, 584; 116 U. S. 252, 29 L. Ed. 615.

Act Ga. August 12, 1910, prohibiting the carrying of a revolver without a license is not a violation of the amendment. *Strickland v. State* (1911), 72 S. E. 260, 137 Ga. 1, 36 L. R. A. (N. S.) 115, Ann. Cas. 1913B, 323 [C. S. p. 14310].

Carrying weapons.—A State statute against carrying concealed weapons does not contravene this amendment. *Robertson v. Baldwin* (1897), 17 Sup. Ct. 326, 329; 165 U. S. 275, 41 L. Ed. 715; [C. S. p. 14310].

St. Okl. 1893, prohibiting the carrying of certain deadly weapons on or about the person, is constitutional, and within the police power of the Territory. *Walburn v. Territory* (1899), 59 P. 972, 9 Okl. 23.

Code W. Va., prohibiting the carrying of a pistol, dirk, bowie knife, etc., or any other dangerous or deadly weapon of like kind, does not violate this amendment. *State v. Workman* (1891), 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 800.

2503. State and territory defined.—That whenever the words "State or Territory" are used in the "Act to promote the efficiency of the militia, and for other purposes," approved January twenty-first, nineteen hundred and three, as amended, they shall be held to apply to and include the District of Columbia. *Sec. 74 added to the act of Mar. 1, 1889 (25 Stat. 772-781), by the act of Feb. 18, 1909 (35 Stat. 636).*

* * * *Provided further*, That the word Territory as used in this Act and in all laws relating to the land militia and National Guard shall include and apply to Hawaii, Alaska, Porto Rico, and the Canal Zone, and the militia of the Canal Zone shall be organized under such rules and regulations, not in conflict with the provisions of this Act, as the President may prescribe. *Sec. 62, act of June 3, 1916 (39 Stat. 198).*

2504. Composition of the militia.—The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia. *Sec. 57, act of June 3, 1916 (39 Stat. 197).*

Notes of Decisions.

Purpose and operation.—Congress has power to determine who shall compose the militia. *Opinion of the Justices* (1850), 80 Mass. (14 Gray) 614.

Age limits.—It is competent for the State legislature to exempt persons from enrollment, designating them by their age—for example, persons under 21 or over 30

years of age. Opinion of the Justices (1838), 39 Mass. (22 Pick.) 571.

Aliens.—An alien is not liable to militia duty. *Slade v. Minor* (C. C. 1817), Fed. Cas. No. 12,937.

Bodily infirmity.—A captain has no authority to exempt a private from the per-

formance of military duty on account of bodily infirmity, upon the certificate of a physician who is not a surgeon or a surgeon's mate of the regiment, and does not reside within the bounds of the regiment. *Cobb v. Lucas* (1833), 32 Mass. (15 Pick.) 1.

2505. Exemption from militia duty.—The Vice President of the United States; the officers, judicial and executive, of the Government of the United States and of the several States and Territories; persons in the military or naval service of the United States; customhouse clerks; persons employed by the United States in the transmission of the mail; artificers and workmen employed in the armories, arsenals, and navy yards of the United States; pilots; mariners actually employed in the sea service of any citizen or merchant within the United States, shall be exempt from militia duty without regard to age, and all persons who because of religious belief shall claim exemption from military service, if the conscientious holding of such belief by such person shall be established under such regulations as the President shall prescribe, shall be exempted from militia service in a combatant capacity; but no person so exempted shall be exempt from militia service in any capacity that the President shall declare to be noncombatant. *Sec. 59, act of June 3, 1916 (39 Stat. 197).*

This act superseded provisions as to exemptions in sec. 2 of the militia act of Jan. 21, 1903 (32 Stat. 775). The principal changes made by the 1916 act were to omit the exemption in the 1903 act of "all persons who are exempted by the laws of the respective States or Territories," and to add in the 1916 act the clause, "but no person so exempted shall be exempt from militia service in any capacity that the President shall declare to be noncombatant."

2506. Powers of the Congress and the States over the Militia.—The Congress shall have Power * * *

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * * *Art. I, sec. 8, Constitution of the United States.*

Notes of Decisions.

Militia power and Army power.—The militia power reserved to the States by the above clause is not to be confounded with the power conferred upon Congress to raise armies. There was left under the jurisdiction of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of the power to raise armies. *Selective Draft Law Cases* (1918), 245 U. S. 366.

Organization and government of militia.—The Military Code of Illinois (act Ill. May 28, 1870 [Laws 1879, p. 192]), for the enrollment, organization, and government of the State militia, is a valid exercise of the police power, and is not unconstitutional as encroaching upon the power of Congress,

under this clause, or as falling within the prohibition of art. 1, sec. 10, that no State shall, without the consent of Congress, keep troops in time of peace; the provisions of art. 11, secs. 5, 6, of such Military Code, forbidding unauthorized bodies of men to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town. *Presser v. State* (1886), 6 Sup. Ct. 580, 116 U. S. 252, 29 L. Ed. 615.

The right of control of the militia by the States and their right to legislate regarding the militia has been fully recognized by the courts; both rights being concurrent with that of the Congress within constitutional limitations to legislate regarding it and its control, the right of the State

yielding to the superior right of Congress. *Alabama Great Southern R. Co. v. U. S.* (1914), 49 Ct. Cl. 522.

The governor of a State has no power to depose an officer, or interfere with the organization of a regiment after such officer or regiment is mustered into service of the United States. (1862) 10 Op. Atty. Gen. 279.

This clause does not confer on Congress the power to designate by law a person to fill a military office, since this would be in direct conflict with the power of appointment given the President by Const. art. 2, sec. 2. (1884) 18 Op. Atty. Gen. 18, 26.

When State militia organizations with officers commissioned by the governor are mustered into United States service, the governor thereafter has no authority to remove them. (1898) 22 Op. Atty. Gen. 225.

The Military Code (act III. May 28, 1879), which provides for the organization of the State militia, does not violate any provision of the State or Federal Constitution, and is not repugnant to any act of Congress as to the relative powers and authority of Congress and the States over the militia. *Dunne v. People* (1879), 94 Ill. 120, 34 Am. Rep. 213.

By the Constitution of the United States, the power to determine who shall compose the militia is vested in Congress; and after it has been exercised by Congress, a State legislature can not constitutionally provide for the enrollment of any other persons in the militia. *Opinion of Justices* (1859), 80 Mass. (14 Gray) 614. See, also, *Tyler v. Pomeroy* (1864), 8 Allen (Mass.) 480.

The only instance where governmental powers may be exercised by the United States is when the militia shall be employed in the service of the United States. At all other times the whole government of

the militia is within the province of the State, and therefore any legislation which the State may adopt relating to the government of the militia in nowise contracts powers conferred upon Congress, as long as it does not infringe upon the method of organization. *People v. Hill* (1891), 59 Hun, 624, 13 N. Y. Supp. 637; judgment affirmed (1891), 126 N. Y. 497, 27 N. E. 789.

Under R. S. 1630, which provides that "the militia of each State shall be arranged into divisions, brigades, regiments, battalions, and companies, as the legislature of the State may direct," a State legislature had power to provide for the disbanding of Organized Militia companies. *People v. Hill* (1891), 126 N. Y. 497, 27 N. E. 789.

Power of governing the militia, given by this clause, is of a limited nature, and confined to the objects specified, and in all other respects and for all other purposes the militia are subject to the control and government of their respective States. *Ansley v. Timmons* (S. C. 1825), 3 McCord, 329.

The duties of the National Guard being defined by the military act (acts 29th Leg. Tex.), by which the governor is alone authorized to prescribe regulations, in the absence of proof that the governor had adopted and promulgated the United States Army Regulations as governing the State militia, such regulations are not applicable to the militia. *Manley v. State* (Tex. Cr. App. 1911), 137 S. W. 1137.

The power of commanding the service of the militia in times of insurrection and invasion is a natural incident to the duties of superintending the common defense, and of watching over the internal peace of the country, and was wisely vested in Congress by the framers of the Constitution. In re *Griner* (1863), 16 Wis. 431.

2507. State troops.—No State shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under this Act: * * * *Sec. 61, act of June 3, 1916 (39 Stat. 198).*

Sec. 10, Art. I of the Constitution of the United States, provides that "No State shall, without the consent of Congress, * * * keep Troops, or Ships of War in time of peace."

2508. State police.—* * * *Provided further,* That nothing contained in this Act shall prevent the organization and maintenance of State police or constabulary. *Sec. 61, act of June 3, 1916 (39 Stat. 198).*

2509. Naval Militia.—The provisions of this Act in respect to the militia shall be applicable only to militia organized as a land force and not to the Naval Militia, which shall consist of such part of the militia as may be prescribed by the President for each State, Territory, or District: *Provided,* That each State, Territory, or District maintaining a Naval Militia as herein prescribed

may be credited to the extent of the number thereof in the quota that would otherwise be required by section sixty-two of this Act. *Sec. 117, act of June 3, 1916 (39 Stat. 212).*

2510. Ancient privileges of militia organizations.—Any corps of Artillery, Cavalry, or Infantry existing in any of the States on the passage of the Act of May eighth, seventeen hundred and ninety-two, which by the laws, customs, or usages of said States has been in continuous existence since the passage of said Act, under its provisions and under the provisions of section two hundred and thirty-two and sections sixteen hundred and twenty-five to sixteen hundred and sixty, both inclusive, of title sixteen of the Revised Statutes of eighteen hundred and seventy-three, and the Act of January twenty-first, nineteen hundred and three, relating to the militia, shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: * * * *Sec. 63, act of June 3, 1916 (39 Stat. 198).*

R. S. 232, and R. S. 1625-1660, were repealed by sec. 25 of the militia act of Jan. 21, 1908 (32 Stat. 786).

2511. Old militia organizations.— * * * *Provided*, That said organizations may be a part of the National Guard and entitled to all the privileges of this Act, and shall conform in all respects to the organization, discipline, and training of the National Guard in time of war: *Provided further*, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving. *Sec. 63, act of June 3, 1916 (39 Stat. 198).*

2512. Rules and regulations for militia.—The President shall make all necessary rules and regulations and issue such orders as may be necessary for the thorough organization, discipline, and government of the militia provided for in this Act. *Sec. 118, act of June 3, 1916 (39 Stat. 213).*

2513. Composition of the National Guard.—The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years. *Sec. 58, act of June 3, 1916 (39 Stat. 197).*

This section, with other sections of said act, principally secs. 60, 63, 68, 82, 91, set forth elsewhere in this volume, superseded sec. 3, Act of Jan. 21, 1903 (32 Stat. 775), as amended by Act of May 27, 1908 (35 Stat. 309).

Notes of Decisions.

Organization.—The terms "National Guard" or "Organized Militia," as used in act Mar. 2, 1907 (34 Stat. 1175), embrace the whole of the militia organized under the laws of the States or Territories, whether intended for land or naval service, and are not restricted to such portions thereof as are intended for land service only. (1907) 26 Op. Atty. Gen. 303.

Powers of the States.—The Military Code (act Ill. May 28, 1879), which provides for the organization of the State Militia, does not violate any provision of the State or Federal Constitution, and is not repugnant to any act of Congress as to the relative

powers and authority of Congress and the States over the militia. *Dunne v. People* (1879), 94 Ill. 120, 34 Am. Rep. 213.

Under R. S. 1630, which provides that "the militia of each State shall be arranged into divisions, brigades, regiments, battalions, and companies, as the legislature of the State may direct," a State legislature had power to provide for the disbanding of Organized Militia companies. *People v. Hill* (1891), 126 N. Y. 497, 27 N. E. 789.

The provision of the Military Code that the commander in chief shall have power to disband companies of the National Guard

whenever, in his judgment, the efficacy of the State force will be thereby increased, is not in conflict with Const. art. 1, sec. 8, empowering Congress to call forth the militia, and provide for their government while in the service of the United States. *People v. Hill* (Sup. 1891), 13 N. Y. Supp. 186; judgment affirmed (1891), 126 N. Y. 497, 27 N. E. 789.

Officers.—The office of colonel of Volunteers in the military service of the United States, as now organized, is not an office in the militia. *Kerr v. Jones* (1862), 19 Ind. 351.

Consolidation.—The governor of the State, as commander in chief of the military forces of the State, has power to consolidate companies and regiments. *People v. Ewen* (N. Y. 1859), 17 How. Prac. 375.

Regulations and discipline.—Under McClain's Code, Iowa, sec. 1572, providing that the discipline of the State National Guard shall conform to the regulations for the government of the Army of the United States, except as otherwise provided; and sec. 1585, providing that every soldier absent without leave from encampment shall be fined \$2 for each day of absence,

suit for the collection of the fines to be brought in the name of the State for the use of his company—the fine is not to be imposed by a militia officer, but by the court before which the action is brought; and the soldier may prove before the court that he had a sufficient excuse for not attending encampment. *State v. Ryan* (1897), 60 N. W. 1123, 101 Iowa, 18.

Minors.—"If a military tribunal has jurisdiction to try a person charged with an offense against military law, the civil courts can not interfere by writ of habeas corpus." *Ex parte Dostal* (Dist. Ct. N. D. Ohio, Aug. 15, 1917), 243 Fed. Rep. 664. War Dept. Bull. 67, Nov. 30, 1917.

Enlistment in the National Guard of a minor under the age of 18 years is not void, but only voidable at the instance of the parent. Where the parent had knowledge of such enlistment two months before the minor became 18 years of age, and three months before his induction into the military service of the United States, as a member of the National Guard, under secs. 57 and 58 of the national defense act (39 Stat. 185), release can not be obtained. *Reed v. Cushman*, 251 Fed. 872.

2514. Organization of the National Guard.—Except as otherwise specifically provided herein, the organization of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the Regular Army, subject in time of peace to such general exceptions as may be authorized by the Secretary of War. And the President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia in order to secure a force which, when combined, shall form complete higher tactical units. *Sec. 60, act of June 3, 1916 (39 Stat. 197).*

* * * *Provided*, That the National Guard of any State, Territory, and the District of Columbia may include such detachments or parts of units as may be necessary in order to form complete tactical units when combined with troops of other States. *Sec. 36, act of June 4, 1920 (41 Stat. 781), amending sec. 60, act of June 3, 1916 (39 Stat. 197).*

For the purpose of maintaining appropriate organization and to assist in instruction and training, the President may assign the National Guard of the several States and Territories and the District of Columbia to divisions, brigades, and other tactical units, and may detail officers either from the National Guard or the Regular Army to command such units: *Provided*, That where complete units are organized within a State, Territory, or the District of Columbia the commanding officers thereof shall not be displaced under the provisions of this section. *Sec. 64, act of June 3, 1916 (39 Stat. 198).*

2515. Reorganization after the World War.—In the reorganization of the National Guard and in the initial organization of the Organized Reserves, the names, numbers, and other designations, flags, and records of the divisions and subordinate units thereof that served in the World War between April 6, 1917, and November 11, 1918, shall be preserved as such as far as practicable. Subject to revision and approval by the Secretary of War, the plans and regulations

under which the initial organization and territorial distribution of the National Guard and the Organized Reserves shall be made, shall be prepared by a committee of the branch or division of the War Department General Staff, hereinafter provided for, which is charged with the preparation of plans for the national defense and for the mobilization of the land forces of the United States. For the purpose of this task said committee shall be composed of members of said branch or division of the General Staff and an equal number of reserve officers, including reserve officers who hold or have held commissions in the National Guard. Subject to general regulations approved by the Secretary of War, the location and designation of units of the National Guard and of the Organized Reserves entirely comprised within the limits of any State or Territory shall be determined by a board, a majority of whom shall be reserve officers, including reserve officers who hold or have held commissions in the National Guard and recommended for this duty by the governor of the State or Territory concerned. *Sec. 3a, added to the act of June 3, 1916, by sec. 3, act of June 4, 1920 (41 Stat. 760).*

2516. Staff corps and departments.— * * * *Provided*, That the National Guard of any State, Territory, or the District of Columbia, shall include such officers and enlisted men of the Staff Corps and Departments, corresponding to those of the Regular Army, as may be authorized by the Secretary of War. *Act of May 12, 1917 (40 Stat. 68), making appropriations for the support of the Army: National Guard.*

Reenacted by the act of July 9, 1918 (40 Stat. 875), making appropriations for the support of the Army: National Guard.

2517. Location of units and headquarters.—The States and Territories shall have the right to determine and fix the location of the units and headquarters of the National Guard within their respective borders: * * * *Sec. 68, act of June 3, 1916 (39 Stat. 200).*

2518. Strength proportionate to representation in Congress.—The number of enlisted men of the National Guard to be organized under this Act within one year from its passage shall be for each State in the proportion of two hundred such men for each Senator and Representative in Congress from such State, and a number to be determined by the President for each Territory and the District of Columbia, and shall be increased each year thereafter in the proportion of not less than fifty per centum until a total peace strength of not less than eight hundred enlisted men for each Senator and Representative in Congress shall have been reached: * * * *Sec. 62, act of June 3, 1916 (39 Stat. 198).*

2519. National Guard for a State with but one Representative in Congress.— * * * *Provided*, That in States which have but one Representative in Congress such increase shall be at the discretion of the President: * * * *And provided further*, That nothing in this Act shall be construed to prevent any State with but one Representative in Congress from organizing one or more regiments of troops, with such auxiliary troops as the President may prescribe; such organizations and members of such organizations to receive all the benefits accruing under this Act under the conditions set forth herein: * * * *Sec. 62, act of June 3, 1916 (39 Stat. 198).*

2520. Maximum strength in a State.— * * * *Provided further*, That this shall not be construed to prevent any State, Territory, or the District of Columbia from organizing the full number of troops required under this

section in less time than is specified in this section, or from maintaining existing organizations if they shall conform to such rules and regulations regarding organization, strength, and armament as the President may prescribe: * * * *Sec. 62, act of June 3, 1916 (39 Stat. 198).*

2521. Time limit for attaining minimum strength.— * * * *Provided*, That the provisions of section 62 of the Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, shall be considered fulfilled if the first strength mentioned therein be attained by June 30, 1920, and the other increments provided therein be attained by successive years thereafter: *Provided further*, That this shall not prevent any State from compliance with the provisions of said section 62: * * * *Act of July 11, 1919 (41 Stat. 127).*

2522. Strength of units.— * * * *Provided*, That no organization of the National Guard, members of which shall be entitled to and shall have received compensation under the provisions of this Act, shall be disbanded, without the consent of the President, nor, without such consent, shall the commissioned or enlisted strength of any such organization be reduced below the minimum that shall be prescribed therefor by the President. *Sec. 68, act of June 3, 1916 (39 Stat. 200).*

That section 60 of said Act be, and the same is hereby, amended by adding the following at the end thereof: "Until July 1, 1921, companies and corresponding units of the National Guard may be recognized at a minimum enlisted strength of fifty: * * * " *Sec. 36, act of June 4, 1920 (41 Stat. 780), amending sec. 60, act of June 3, 1916 (39 Stat. 197).*

2523. Vacant.

2524. Oath of enlistment.—Men enlisting in the National Guard of the several States, Territories, and the District of Columbia, shall sign an enlistment contract and subscribe to the following oath of enlistment: "I do hereby acknowledge to have voluntarily enlisted this — day of —, 19—, as a soldier in the National Guard of the United States and of the State of —, for the period of three (or one) year —, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United State of America and to the State of —, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the governor of the State of —, and of the officers appointed over me according to law and the rules and Articles of War." *Sec. 70, act of June 3, 1916 (39 Stat. 201), as amended by sec. 38, act of June 4, 1920 (41 Stat. 781).*

This section supersedes sec. 71, act of June 3, 1916 (39 Stat. 201).

Notes of Decisions.

Refusal to take oath.—A member of the Massachusetts Volunteer Militia refused to take the above oath, but had taken an oath to faithfully observe the laws for the regulation of the government of the volunteer militia of the State and to support the Constitution of the United States. Held, that although he did not elect to sign a new enlistment contract, he was subject, until the expiration of the term of his enlistment, to being called into active service by the

President for the purposes enumerated in sec. 8, art. 1, of the Constitution, viz., to execute the laws of the Union, suppress insurrections, or repel invasions. Sec. 70 should not be construed as terminating the unexpired term of his original enlistment and relieving him from obligation to respond to the President's call. *Sweetser v. Emerson (C. C. A. 1916), 236 Fed. 161; Sweetser v. Lowell (C. C. A. 1916), 236 Fed. 169.*

2525. Period of enlistment.—Original enlistments in the National Guard shall be for a period of three years and subsequent enlistments for periods of one year each: *Provided*, That persons who have served in the Army for not less than six months, and have been honorably discharged therefrom, may, within two years after the passage of this Act, enlist in the National Guard for a period of one year and reenlist for like periods. *Sec. 69, act of June 3, 1916 (39 Stat. 200), as amended by sec. 37, act of June 4, 1920 (41 Stat. 781).*

2526. Discharge of enlisted men.—An enlisted man discharged from service in the National Guard, except when drafted into the military service of the United States under the provisions of section 111 of this Act, shall receive a discharge in writing in such form and with such classification as is or shall be prescribed for the Regular Army, and in time of peace discharges may be given prior to the expiration of terms of enlistment under such regulations as the President may prescribe. *Sec. 72, act of June 3, 1916 (39 Stat. 201), as amended by sec. 40, act of June 4, 1920 (41 Stat. 781).*

2527. Status upon discharge from Federal service.— * * * On the termination of the emergency all persons so drafted shall be discharged from the Army, shall resume their membership in the militia, and, if the State so provide, shall continue to serve in the National Guard until the dates upon which their enlistments entered into prior to their draft, would have expired if uninterrupted. *Sec. 111, act of June 3, 1916 (39 Stat. 211), as amended by sec. 49, act of June 4, 1920 (41 Stat. 784-785).*

2528. Selection of commissioned officers.—Persons hereafter commissioned as officers of the National Guard shall not be recognized as such under any of the provisions of this Act unless they shall have been selected from the following classes, and shall have taken and subscribed to the oath of office prescribed in the preceding section of this Act; officers or enlisted men of the National Guard; officers, active or retired, reserve officers, and former officers of the Army, Navy, or Marine Corps, enlisted men and former enlisted men of the Army, Navy, or Marine Corps who have received an honorable discharge therefrom; graduates of the United States Military and Naval Academies; and graduates of schools, colleges, universities, and officers' training camps, where they have received military instruction under the supervision of an officer of the Regular Army who certified their fitness for appointment as commissioned officers; and for the technical branches or Staff Corps and departments, such other civilians as may be specially qualified for duty therein. *Sec. 74, act of June 3, 1916 (39 Stat. 201), as amended by sec. 41, act of June 4, 1920 (41 Stat. 781-782).*

2529. Appointment of officers for drafted organizations.— * * * The commissioned officers of said organizations shall be appointed from among the members thereof; officers with rank not above that of colonel to be appointed by the President alone, and all other officers to be appointed by the President by and with the advice and consent of the Senate. * * * *Sec. 111, act of June 3, 1916 (39 Stat. 211), as amended by sec. 49, act of June 4, 1920 (41 Stat. 784).*

2530. Filling vacancies in drafted organizations.—All vacancies occurring in any grade of commissioned officers in any organization in the military service of the United States and composed of persons drafted from the National Guard under the provisions of this Act shall be filled by the President, as far as practicable, by the appointment of persons similarly taken from said guard, and

in the manner prescribed by law for filling similar vacancies occurring in the volunteer forces. *Sec. 76, act of June 3, 1916 (39 Stat. 202).*

2531. Examinations for officers.—The provisions of this Act shall not apply to any person hereafter appointed an officer of the National Guard unless he first shall have successfully passed such tests as to his physical, moral, and professional fitness as the President shall prescribe. The examination to determine such qualifications for commission shall be conducted by a board of three commissioned officers appointed by the Secretary of War from the Regular Army or the National Guard, or both. *Sec. 75, act of June 3, 1916 (39 Stat. 202).*

2532. Continuance in the National Guard of officers who took the Federal oath.—Commissioned officers of the National Guard of the several States, Territories, and the District of Columbia now serving under commissions regularly issued shall continue in office, as officers of the National Guard, without the issuance of new commissions: *Provided*, That said officers have taken, or shall take and subscribe to the following oath of office: "I, ———, do solemnly swear that I will support and defend the Constitution of the United States and the constitution of the State of ———, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the President of the United States and of the governor of the State of ———; that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of ——— in the National Guard of the United States and of the State of ——— upon which I am about to enter, so help me God." *Sec. 73, act of June 3, 1916 (39 Stat. 201).*

2533. Adjutants-General of the National Guard of States, etc.—There shall be appointed in each State, Territory, and District of Columbia, an Adjutant-General, who shall perform such duties as may be prescribed by the laws of such State, Territory, and District, respectively, and make returns to the Secretary of War, at such times and in such form as he shall from time to time prescribe, of the strength of the organized militia, and also make such reports as may from time to time be required by the Secretary of War. That the Secretary of War shall, with his annual report of each year, transmit to Congress an abstract of the returns and reports of the adjutants-general of the States, Territories, and the District of Columbia, with such observations thereon as he may deem necessary for the information of Congress. *Sec. 12, act of Jan. 21, 1903 (32 Stat. 776).*

Parts of this section are superseded by similar provisions of sec. 66 of act of June 3, 1916, post, 2534.

Notes of Decisions.

Office of Adjutant General.—The office of Adjutant General exists in Nebraska by virtue of an appointment from the governor as Commander in Chief of the military forces, acting under authority given him by act of May 8, 1792 (1 Stat. 273), and act of Neb. March 4, 1870 (Gen. St. 470). Such office is not executive, within the meaning of the constitutional provision that "no other executive State office (aside from those mentioned) shall be continued

or created." *State v. Weston* (1876), 4 Neb. 234.

Blanks and forms.—Under act of May 8, 1792, sec. 6, requiring the Adjutant General to furnish blanks and forms to the militia for the return of enrollments, the forms so prescribed and furnished are of the same binding force as if contained in the act itself. *Sawtel v. Davis* (1828), 5 Me. (5 Greenl.) 438.

2534. Returns and reports by officers.—The adjutants general of the States, Territories, and the District of Columbia and the officers of the National Guard shall make such returns and reports to the Secretary of War, or to such officers as he may designate, at such times and in such form as the Secretary of War may from time to time prescribe: * * * *Sec. 66, act of June 3, 1916 (39 Stat. 199).*

See notes 2533, ante.

2535. Discharge of officers.—At any time the moral character, capacity, and general fitness for the service of any National Guard officer may be determined by an efficiency board of three commissioned officers, senior in rank to the officer whose fitness for service shall be under investigation, and if the findings of such board be unfavorable to such officer and be approved by the official authorized to appoint such an officer, he shall be discharged. Commissions of officers of the National Guard may be vacated upon resignation, absence without leave for three months, upon the recommendation of an efficiency board, or pursuant to sentence of a court-martial. * * * *Sec. 77, act of June 3, 1916 (39 Stat. 202).*

2536. Transfer of officers to the National Guard Reserve.— * * * Officers of said guard rendered surplus by the disbandment of their organizations shall be placed in the National Guard Reserve. Officers may, upon their own application, be placed in the said reserve. *Sec. 77, act of June 3, 1916 (39 Stat. 202).*

2537. Command over the National Guard of a Territory.—The executive power of each Territory shall be vested in a governor, who shall hold his office for four years, and until his successor is appointed and qualified, unless sooner removed by the President. He shall reside in the Territory for which he is appointed, and shall be commander-in-chief of the militia thereof. He may grant pardons and reprieves, and remit fines and forfeitures, for offenses against the laws of the Territory for which he is appointed, and respites for offenses against the laws of the United States, till the decision of the President can be made known thereon. He shall commission all officers who are appointed under the laws of such Territory, and shall take care that the laws thereof be faithfully executed. *R. S. 1841.*

Notes of Decisions.

Powers of governor.—As a rule the governor of a Territory can remove only such officers as have been duly appointed by him to hold at pleasure. (1874) 14 Op. Atty. Gen. 422.

He has no power to remove officers appointed during pleasure by others than himself, or officers whose tenure is for a stated term or for good behavior, unless so authorized by the organic law or (in some cases) by the territorial law. *Id.*

Accordingly, where certain officers created by a territorial statute were appointed by the governor, with the consent of the council of the Territory, for the term of two years: Held, that, in the absence of a power of removal expressly conferred by law upon the governor, those officers are not removable by him. *Id.*

2538. Officers of the National Guard of Territories.—All township, district, and county officers except justices of the peace and general officers of the militia, shall be appointed or elected in such manner as may be provided by the governor and legislative assembly of each Territory; and all other officers not herein otherwise provided for, the governor shall nominate, and by and with the advice and consent of the legislative council of each Territory shall appoint; but, in the first instance, where a new Territory is hereafter created

by Congress, the governor alone may appoint all the officers referred to in this and the preceding section and assign them to their respective townships, districts, and counties; and the officers so appointed shall hold their offices until the end of the first session of the legislative assembly. *R. S. 1857.*

See sec. 1, act of May 27, 1910 (30 Stat. 443), 2991, post.

2539. General officers of the National Guard of Territories.—Justices of the peace and all general officers of the militia in the several Territories shall be elected by the people in such manner as the respective legislatures may provide by law. *R. S. 1856.*

See sec. 1, act of May 27, 1910 (30 Stat. 443), 2991, post.

2540. Adjutants general of the National Guard of Territories.— * * * *Provided*, That the adjutants general of the Territories and of the District of Columbia shall be appointed by the President with such rank and qualifications as he may prescribe, and each adjutant general for a Territory shall be a citizen of the Territory for which he is appointed. *Sec. 66, act of June 3, 1916 (39 Stat. 199).*

2541. Commander-in-chief of the National Guard of the District of Columbia.—That the President of the United States shall be the commander in chief of the militia of the District of Columbia. *Sec. 6, act of Mar. 1, 1889 (25 Stat. 773).*

2542. Commanding general of the National Guard of the District of Columbia.—That there shall be appointed and commissioned by the President of the United States a commanding general of the militia of the District of Columbia, with the rank of brigadier-general, who shall hold office until his successor is appointed and qualified, but may be removed at any time by the President. *Sec. 7, act of Mar. 1, 1889 (25 Stat. 773).*

2543. Staff officers of the National Guard of the District of Columbia.—That to comply with the provisions of section 110, of the Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, it is hereby provided that staff officers, including officers of the Pay, Inspection, Subsistence, and Medical Departments, appointed in the National Guard of the District of Columbia shall have had previous military experience and shall hold their positions until they shall have reached the age of sixty-four years, unless retired prior to that time by reason of resignation, disability, or for cause to be determined by a court-martial legally convened for that purpose, and that vacancies among said officers shall be filled by appointment from the officers of the National Guard of the District of Columbia. *Act of July 11, 1919 (41 Stat. 127).*

2544. Armory for the National Guard of the District of Columbia.— * * * *Provided*, That the commanding general of the Militia of the District of Columbia is authorized to enter into a contract or contracts for the lease of an armory, stable, drill shed, and warehouse for Cavalry, Field Artillery, Signal Corps, and Hospital Corps troops in one building, or separately, for a period not to exceed five years, renewable at the option of the said commanding general for an additional period of not exceeding five years, at an annual rental not to exceed \$10,000: * * * *Act of Mar. 3, 1917 (39 Stat. 1040).*

2545. Use of grounds at Washington Barracks by the National Guard of the District of Columbia.—The National Guard shall have the use of the drill grounds and rifle-range at the Washington Barracks, subject to the approval of the Secretary of War, and the commanding general of the militia shall

provide such additional targets and accessories as may be necessary for the use of militia. *Sec. 44, act of Mar. 1, 1889 (25 Stat. 778).*

Change the number of section forty-four to "forty-seven." *Act of Feb. 18, 1909 (35 Stat. 634), amending sec. 44, act of Mar. 1, 1889 (25 Stat. 779).*

2546. Enlistment in the National Guard of the District of Columbia during the World War.—That during the present war enlistments in the National Guard of the District of Columbia and appointment of officers of said National Guard shall be made from men who, upon examination, are found to be physically and mentally fit for military service, and within such age limits as may be prescribed by the commanding general of the District of Columbia Militia, with the approval of the President of the United States: *Provided, however,* That the joining of the National Guard of the District of Columbia, under the provisions of this Act by anyone either as an officer or an enlisted man, shall not relieve him from liability for any service in the United States military or naval forces to which he would otherwise be subject: *And provided further,* That enlistments under the provisions of this Act shall not prevent the continuance of enlistments, during the period of the war, of such men in the National Guard for the District of Columbia who may so elect, under the requirements of six-year contract of enlistment as heretofore prescribed: *And provided further,* That enlistments in the National Guard of the District of Columbia of the special class, and appointments of officers as herein specially provided, shall be for the period of the war and for a period not exceeding three months thereafter, if such additional term of service be required by the President of the United States, and, further, for service within the District of Columbia, or in cases of emergency, in the adjoining States of Maryland and Virginia, and such officers and enlisted men when in service, shall receive the same pay and allowances as are now provided by law for the National Guard of the District of Columbia: *And provided further,* That all officers appointed under the provisions of this Act shall be commissioned by the President of the United States, on the recommendation of the commanding general of the District of Columbia Militia, and no officer shall be commissioned without first being subject to an examination to determine his fitness to hold commission: *And provided further,* That during the period of the war retired officers of the National Guard of the District of Columbia may, if they so request, be assigned to duty as officers of the District of Columbia National Guard, in such grades as the President may direct, subject to examination: *And provided further,* That officers who have served in the National Guard and have resigned therefrom and officers and enlisted men who have been honorably discharged shall, during the period of the war, be eligible to reappointment and commission in the National Guard of the District of Columbia in such grades as they may be found qualified by examination to fill.

That at the termination of the existing war, as determined by the proclamation of the President, the provisions of this Act shall become null and void. *Act of Nov. 4, 1918 (40 Stat. 1019).*

2547. Enlistment in the National Guard Reserve.—That hereafter, men duly qualified under regulations prescribed by the Secretary of War may enlist in the National Guard Reserve for a period of one or three years, under such regulations as the Secretary of War shall prescribe, and on so enlisting they shall subscribe to the following enlistment contract and take the oath therein specified: "I do hereby acknowledge to have voluntarily enlisted this _____ day of _____, 19—, as a soldier in the National Guard Reserve of the

United States and of the State of ———, for a period of one (or three) year—, unless sooner discharged by proper authority, and I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of ———, and that I will serve them honestly and faithfully against all their enemies whomsoever and that I will obey the orders of the President of the United States and the governor of the State of ———, and of the officers appointed over me according to law and the rules and Articles of War”: * * * *Sec. 78, act of June 3, 1916 (39 Stat. 202), as amended by sec. 42, act of June 4, 1920 (41 Stat. 782).*

2548. Use of the National Guard by the States and Territories.— * * * *Provided, That nothing contained in this Act shall be construed as limiting the rights of States and Territories in the use of the National Guard within their respective borders in time of peace: * * * Sec. 61, act of June 3, 1916 (39 Stat. 198).*

2548½. Call into Federal service.—That whenever the United States is invaded or in danger of invasion from any foreign nation, or of rebellion against the authority of the Government of the United States, or the President is unable with the regular forces at his command to execute the laws of the Union, it shall be lawful for the President to call forth such number of the militia of the State or of the States or Territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose, through the governor of the respective State or Territory, or through the commanding general of the militia of the District of Columbia, from which State, Territory, or District such troops may be called, to such officers of the militia as he may think proper. *Sec. 4, act of Jan. 21, 1903 (32 Stat. 776), as amended by sec. 3, act of May 27, 1908 (35 Stat. 400).*

That whenever the President calls forth the organized militia of any State, Territory, or of the District of Columbia, to be employed in the service of the United States, he may specify in his call the period for which such service is required, and the militia so called shall continue to serve during the term so specified, either within or without the Territory of the United States, unless sooner relieved by order of the President: *Provided, That no commissioned officer or enlisted man of the organized militia shall be held to service beyond the term of his existing commission or enlistment: Provided further, That when the military needs of the Federal Government arising from the necessity to execute the laws of the Union, suppress insurrection, or repel invasion, can not be met by the regular forces, the organized militia shall be called into the service of the United States in advance of any volunteer force which it may be determined to raise. Sec. 5, act of Jan. 21, 1903 (32 Stat. 776), as amended by sec. 4, act of May 27, 1908 (35 Stat. 400).*

That when the militia of more than one State is called into the actual service of the United States by the President he may, in his discretion, apportion them among such States or Territories or to the District of Columbia according to representative population. *Sec. 6, act of Jan. 21, 1903 (32 Stat. 776).*

That the militia, when called into the actual service of the United States, shall, during their time of service, be entitled to the same pay and allowances as are or may be provided by law for the Regular Army. *Sec. 10, act of Jan. 21, 1903 (32 Stat. 776).*

The editors of the "Compiled Statutes" and "Federal Statutes Annotated" deem the above provisions, applicable to "call" of the National Guard, repealed by sec. 111, of the national defense act (post, 2549), relating to "draft" of the same. Such is not the view of the Judge Advocate General. Ops. J. A. G. 82—200, Oct. 22, 1917. See also notes to 2549, post. See also 2814 and 2819, post.

2549. Draft into Federal service.—When Congress shall have authorized the use of the armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination, as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war or emergency, unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Army, whose permanent retention in the military service is not contemplated by law, and shall be organized into units corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct. * * * *Sec. 111, act of June 3, 1916 (39 Stat. 211), as amended by sec. 49, act of June 4, 1920 (41 Stat. 784).*

For the constitutional power to call forth the militia, see 2786, post.

Notes of Decisions.

Application of Constitution and laws.—Const. art. 1, sec. 8, cl. 15, which confers power upon Congress to provide for the calling forth of the militia to execute the law of the United States, and act of February 28, 1795, applies to the States. *U. S. v. Stewart* (C. C. 1957), Fed. Cas. No. 16,401a.

Necessity of call.—The President alone is made the judge of the necessity of calling the militia into the service of the United States. *Martin v. Mott* (1827), 25 U. S. (12 Wheat.) 19, 6 L. Ed. 537; *Vanderheyden v. Young* (N. Y. 1814), 11 Johns. 150.

Foreign service.—The President has no authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation. (1912) 29 Op. Atty. Gen. 322.

Under the national defense act a member of the National Guard, though not consenting to be mustered into the Federal service under presidential order, held a soldier in the United States Army, and subject to military trial or punishment. *Ex parte Dostal* (D. C. 1917), 243 Fed. 664.

Under art. 1, sec. 8, of the Constitution, the selective service act of May 18, 1917 (40 Stat. 76), and this act, the President

may draft compulsorily into the Federal service officers and enlisted men of the National Guard, and Congress had authority to confer such power. *Id.*

This section does not merely authorize the calling forth of the militia to execute the laws, suppress insurrections and repel invasions. *Selective Draft Law Cases* (1918), 245 U. S. 366; *U. S. v. Sugar* (D. C. 1917), 243 Fed. 423.

Physical examination.—Where petitioner was physically examined and accepted on being drafted under this section, and his physical examination was not shown to be irregular or unfair, his status is determined by the draft of Aug. 5, 1917, and irregularities, if any, which may have occurred at the time of his previous examination and voluntary enlistment, are immaterial. *Blackington v. U. S.* (C. C. A. 1918), 248 Fed. 124, affirming 245 Fed. 801.

State powers.—Where a member of the State National Guard has been drafted into the military service under the national defense act, and hence is beyond the jurisdiction of the State courts, an appellate State court will not consider whether he was properly mustered into the service of the State, as the question has become moot. *Ex parte McMillan* (Ala. App. 1917), 74 South. 396.

Effect of muster.—The effect of mustering into the service of the United States of a person elected colonel by State volunteers could not be to make him an officer of the United States, nor could he become one by his own acts; a commission from the proper executive authority being necessary. *Watson v. Cobb* (1863), 2 Kan. 32.

The commanding general of the National Guard of the District of Columbia though

accepting a commission and acting as colonel in the Volunteer Army, for service in the war with Spain, is still the commanding officer of the District Militia, and is authorized, under act of May 11, 1898 (30 Stat. 404), to nominate candidates for appointment as officers in the naval battalion. (1898) 22 Op. Atty. Gen. 237.

2550. Draft of the Philippine Militia into Federal service.—That the militia and other locally created armed forces in the Philippine Islands may be called into the service of the United States, and all members thereof may be drafted into said service and organized in such manner as is or may be provided by law for calling or drafting the National Guard into said service, and shall in all respects while therein be upon the same footing with members of the National Guard so called or drafted: *Provided*, That the pay and allowances of officers and men of the Philippine Militia and other locally created armed forces in the Philippine Islands called into the service of the United States under the provisions of this Act when serving in the Philippine Islands shall in no case exceed the pay and allowances for corresponding grades of Philippine Scouts. *Act of Jan. 26, 1918 (40 Stat. 432).*

2551. Physical examination of National Guardsmen when drafted.—Every officer and enlisted man of the National Guard who shall be called into the service of the United States as such shall be examined as to his physical fitness under such regulations as the President may prescribe without further commission or enlistment: * * * *Sec. 115, act of June 3, 1916 (39 Stat. 212).*

This section, together with sec. 111 of this act, probably superseded sec. 7 of act of June 21, 1903 (32 Stat. 776), as amended by sec. 5, act of May 27, 1908 (35 Stat. 401), which was as follows:

"Every officer and enlisted man of the militia who shall be called forth in the manner hereinbefore prescribed, shall be mustered for service without further enlistment, and without further medical examination previous to such muster, except for those States and Territories which have not adopted the standard of medical examination prescribed for the Regular Army: *Provided, however*, That any officer or enlisted man of the militia who shall refuse or neglect to present himself for such muster, upon being called forth as herein prescribed, shall be subject to trial by court-martial and shall be punished as such court-martial may direct."

2552. Vacant.

2553. Drafted National Guard to be subject to the rules and regulations for the Army.—The National Guard when called as such into the service of the United States shall, from the time they are required by the terms of the call to respond thereto, be subject to the laws and regulations governing the Regular Army, so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law. *Sec. 101, act of June 3, 1916 (39 Stat. 208).*

This section probably superseded sec. 9, act of Jan. 21, 1903 (32 Stat. 776), which was as follows: "The militia, when called into the actual service of the United States, shall be subject to the same Rules and Articles of War as the regular troops of the United States."

2554. Physical examination prior to muster out.— * * * *Provided*, That immediately preceding the muster out of an officer or enlisted man called into the active service of the United States he shall be physically examined under rules

prescribed by the President of the United States, and the record thereof shall be filed and kept in the War Department. *Sec. 115, act of June 3, 1916 (39 Stat. 212).*

See notes under 2551, ante.

2555. Draft of the National Guard to join the Mexican punitive expedition.—That in the opinion of the Congress of the United States an emergency now exists which demands the use of troops in addition to the Regular Army of the United States, and that the President be, and he is hereby, authorized to draft into the military service of the United States, under the provisions of section one hundred and eleven of the national defense Act approved June third, nineteen hundred and sixteen, so far as the provisions of said section may be applicable and not inconsistent with the terms hereof, any or all members of the National Guard and of the Organized Militia of the several States, Territories, and the District of Columbia and any and all members of the National Guard and Organized Militia Reserves, to serve for the period of the emergency, not exceeding three years, unless sooner discharged: *Provided*, That all persons so drafted shall, from the date of their draft, stand discharged from the militia during the period of their service under said draft. *Sec. 1, Joint Res. 23, July 1, 1916 (39 Stat. 339).*

This was sec. 1 of the resolution of July 1, 1916, No. 211, under which the National Guard were sent to the Mexican border.

Appropriation for the transportation, when authorized by the Secretary of War, of members of the National Guard who have been mustered into the service of the United States and have been discharged under the order of the War Department as to mustering out members with dependent families, from their position on the Mexican border to their homes, was made by the Army appropriation act for the year 1917, act of Aug. 29, 1916 (39 Stat. 619); and provision that nothing contained in said appropriation act should be construed as precluding the payment of travel allowance as provided in sec. 126, act of June 3, 1916, to enlisted men of the National Guard on their discharge from the service of the United States, and that the Army transportation appropriation for the fiscal year 1917 should be available for this purpose and also for the purpose of paying travel pay to officers of the National Guard on their discharge from service as prescribed by act of Mar. 2, 1901, was made by the deficiency appropriation act for the year 1916 of Sept. 8, 1916 (39 Stat. 801).

2556. Organizations for Mexican Punitive expedition.—That when organizations the members of which are drafted under the provisions of this resolution do not constitute complete tactical units the President may, by combining such organizations, organize battalions, regiments, brigades, and divisions, and may appoint officers for such units from the Regular Army, from the members of such organizations, from those duly qualified and registered pursuant to section twenty-three of the Act of Congress approved January twenty-first, nineteen hundred and three, or members of the Officers' Reserve Corps as provided in section thirty-eight of the national defense Act of June third, nineteen hundred and sixteen, officers with rank not above that of colonel to be appointed by the President alone and all other officers to be appointed by the President, by and with the advice and consent of the Senate: * * * *Sec. 3, Joint Res. 23 July 1, 1916 (39 Stat. 340).*

Sec. 23 of act of Jan. 21, 1903, providing for examinations for commissions in volunteer forces, is set forth 2488, ante.

Sec. 38 of the national defense act of June 3, 1916, was repealed by sec. 31, act of June 4, 1920 (41 Stat. 775).

Sec. 8 of act of Apr. 25, 1914, as to filling temporary vacancies made in the Army by appointments of officers in Volunteers, is set forth 2295, ante.

2557. Draft of the National Guard for the World War.— * * * Second. To draft into the military service of the United States, organize, and officer, in accordance with the provisions of section one hundred and eleven of said national defense Act, so far as the provisions of said section may be applicable and not inconsistent with the terms of this Act, any or all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged: *Provided*, That when so drafted the organizations or units of the National Guard shall, so far as practicable, retain the State designations of their respective organizations. * * * *Sec. 1, act of May 18, 1917 (40 Stat. 76).*

2558. System of courts-martial.—Except in organizations in the service of the United States, court-martial in the National Guard shall be of three kinds, namely, general courts-martial, special courts-martial, and summary courts-martial. They shall be constituted like, and have cognizance of the same subjects, and possess like powers, except as to punishments, as similar courts provided for by the laws and regulations governing the Army of the United States, and the proceedings of courts-martial of the National Guard shall follow the forms and modes of procedure prescribed for said similar courts. *Sec. 102, act of June 3, 1916 (39 Stat. 208).*

2559. General courts-martial.—General courts-martial of the National Guard not in the service of the United States may be convened by orders of the President, or of the governors of the respective States and Territories, or by the commanding general of the National Guard of the District of Columbia, and such courts shall have the power to impose fines not exceeding \$200; to sentence to forfeiture of pay and allowances; to a reprimand; to dismissal or dishonorable discharge from the service; to reduction of noncommissioned officers to the ranks; or any two or more of such punishments may be combined in the sentences imposed by such courts. *Sec. 103, act of June 3, 1916 (39 Stat. 208).*

2560. Special courts-martial.—In the National Guard, not in the service of the United States, the commanding officer of each garrison, fort, post, camp, or other place, brigade, regiment, detached battalion, or other detached command, may appoint special courts-martial for his command; but such special courts-martial may in any case be appointed by superior authority when by the latter deemed desirable. Special courts-martial shall have power to try any person subject to military law, except a commissioned officer, for any crime or offense made punishable by the military laws of the United States, and such special courts-martial shall have the same powers of punishment as do general courts-martial, except that fines imposed by such courts shall not exceed \$100. *Sec. 104, act of June 3, 1916 (39 Stat. 208).*

2561. Summary courts-martial.—In the National Guard, not in the service of the United States, the commanding officer of each garrison, fort, post, or other place, regiment or corps, detached battalion, company, or other detachment of the National Guard may appoint for such place or command a summary court to consist of one officer, who shall have power to administer oaths and to try the enlisted men of such place or command for breaches of discipline and violations of law governing such organizations; and said court, when satisfied of the guilt of such soldier, may impose fines not exceeding \$25 for any single offense; may sentence noncommissioned officers to reduction

to the ranks; may sentence to forfeiture of pay and allowances. The proceedings of such court shall be informal, and the minutes thereof shall be the same as prescribed for summary courts of the Army of the United States. *Sec. 105, act of June 3, 1916 (39 Stat. 208).*

2562. Warrants for arrest.—In the National Guard, not in the service of the United States, presidents of courts-martial and summary court officers shall have power to issue warrants to arrest accused persons and to bring them before the court for trial whenever such persons shall have disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order, and to issue subpoenas and subpoenas duces tecum and to enforce by attachment attendance of witnesses and the production of books and papers, and to sentence for a refusal to be sworn or to answer as provided in actions before civil courts. * * * *Sec. 108, act of June 3, 1916 (39 Stat. 209).*

2563. Execution of processes and sentences of courts-martial.— * * * All processes and sentences of said courts shall be executed by such civil officers as may be prescribed by the laws of the several States and Territories, and in any State where no provision shall have been made for such action, and in the Territories and the District of Columbia, such processes and sentences shall be executed by a United States marshal or his duly appointed deputy, and it shall be the duty of any United States marshal to execute all such processes and sentences and make return thereof to the officer issuing or imposing the same. *Sec. 108, act of June 3, 1916 (39 Stat. 209).*

Notes of Decisions.

Fines and enforcement thereof.—Judgment upon 10 days' notice can not be rendered upon the bond given by the collector of militia fines. *Legionary Paymaster v. Spalding (C. C. 1806), Fed. Cas. No. 8,212.*

In trespass against the marshal for levying a distress for a militia fine, he need

only show in justification that the military court had jurisdiction, and that it was regularly constituted and imposed the fine. *Slade v. Minor (C. C. 1817), Fed. Cas. No. 12,937.*

Militia fines and enforcement thereof in the District of Columbia. *Ryan v. Ringgold (C. C. 1826), Fed. Cas. No. 12,187.*

2564. Confinement imposed by courts-martial.—All courts-martial of the National Guard, not in the service of the United States, including summary courts, shall have power to sentence to confinement in lieu of fines authorized to be imposed: *Provided*, That such sentences of confinement shall not exceed one day for each dollar of fine authorized. *Sec. 106, act of June 3, 1916 (39 Stat. 209).*

2565. Sentences of dismissal or dishonorable discharge.—No sentence of dismissal from the service or dishonorable discharge, imposed by a National Guard court-martial, not in the service of the United States, shall be executed until approved by the governor of the State or Territory concerned, or by the commanding general of the National Guard of the District of Columbia. *Sec. 107, act of June 3, 1916 (39 Stat. 209).*

2566. Membership of courts-martial.—That the majority membership of courts-martial for the trial of officers or men of the militia when in the service of the United States shall be composed of militia officers. *Sec. 8, act of Jan. 21, 1903 (32 Stat. 776), as amended by sec. 6, act of May 27, 1908 (35 Stat. 401).*

This section, as originally enacted, was as follows:

"Courts-martial for the trial of officers or men of the militia, when in the service of the United States, shall be composed of militia officers only."

Provision that no distinction shall be made between the Regular Army, the Organized Militia while in the military service of the United States, and the volunteer forces, in respect to the eligibility of any officer of said Army, militia, or volunteer forces for service upon any court-martial, court of inquiry, or military commission, was made by sec. 4 of the act to provide for raising the volunteer forces of the United States in time of actual or threatened war, of Apr. 25, 1914, ante, 2499.

2567. National Guard to be trained like the Regular Army.—The discipline (which includes training) of the National Guard shall conform to the system which is now or may hereafter be prescribed for the Regular Army, and the training shall be carried out by the several States, Territories, and the District of Columbia so as to conform to the provisions of this Act. *Sec. 91, act of June 3, 1916 (39 Stat. 206).*

2568. Amount of training required each year.—Each company, troop, battery, and detachment in the National Guard shall assemble for drill and instruction, including indoor target practice, not less than forty-eight times each year, and shall, in addition thereto, participate in encampments, maneuvers, or other exercises, including outdoor target practice, at least fifteen days in training each year, including target practice, unless such company, troop, battery, or detachment shall have been excused from participation in any part thereof by the Secretary of War: * * * *Sec. 92, act of June 3, 1916 (39 Stat. 206).*

This section probably superseded sec. 18, act of Jan. 21, 1903 (32 Stat. 778), reading as follows: "Each State or Territory furnished with material of war under the provisions of this or former Acts of Congress shall, during the year next preceding each annual allotment of funds, in accordance with section sixteen hundred and sixty-one of the Revised Statutes as amended, have required every company, troop, and battery in its organized militia not excused by the governor of such State or Territory to participate in practice marches or go into camp of instruction at least five consecutive days, and to assemble for drill and instruction at company, battalion, or regimental armories or rendezvous or for target practice not less than twenty-four times, and shall also have required during such year an inspection of each such company, troop, and battery to be made by an officer of such militia or an officer of the Regular Army."

2569. Credit for assembly for drills and target practice.—* * * *Provided,* That credit for an assembly for drill or for indoor target practice shall not be given unless the number of officers and enlisted men present for duty at such assembly shall equal or exceed a minimum to be prescribed by the President, nor unless the period of actual military duty and instruction participated in by each officer and enlisted man at each such assembly at which he shall be credited as having been present shall be of at least one and one-half hours' duration and the character of training such as may be prescribed by the Secretary of War. *Sec. 92, act of June 3, 1916 (39 Stat. 206).*

2570. Attendance at military service schools.—Under such regulations as the President may prescribe, the Secretary of War may, upon the recommendation of the governor of any State or Territory or the commanding general of the National Guard of the District of Columbia, authorize a limited number of selected officers or enlisted men of the National Guard to attend and pursue a regular course of study at any military service school of the United States, except the United States Military Academy; or to be attached to an organization of the same arm, corps, or department to which such officer or enlisted man shall belong, for routine practical instruction at or near an Army post during a period of field training or other outdoor exercises; and such officer or enlisted man shall receive, out of any National Guard allotment of funds available for the purpose, the same travel allowances and quarters, or commutation of quarters, and the same pay, allowances, and subsistence to which an

officer or enlisted man of the Regular Army would be entitled for attending such school, college, or practical course of instruction under orders from proper military authority, while in actual attendance at such school, college, or practical course of instruction: *Provided*, That in no case shall the pay and allowances authorized by this section exceed those of a captain. *Sec. 99, act of June 3, 1916 (39 Stat. 207).*

This was sec. 99 of the national defense act. It probably superseded sec. 16, act of Jan. 21, 1903 (32 Stat. 778), amended sec. 10, act of May 27, 1908 (35 Stat. 402), as follows: "Whenever any officer or enlisted man of the organized militia shall upon the recommendation of the governor of any State, Territory, or the commanding general of the District of Columbia militia, and when authorized by the President, attend and pursue a regular course of study at any military school or college of the United States, such officer or enlisted man shall receive from the annual appropriation for the support of the Army, the same travel allowances and quarters or commutation of quarters to which an officer or enlisted man of the Regular Army would be entitled for attending such school or college under orders from proper military authority; such officer shall also receive commutation and subsistence at the rate of one dollar per day and each enlisted man such subsistence as is furnished to an enlisted man of the Regular Army while in actual attendance upon a course of instruction."

The necessary money is provided for in the annual appropriations for the support of the Army.

2571. Use of rifle ranges.— * * * *Provided*, That all home guards, State troops and militia receiving arms and equipments as herein provided shall have the use, in the discretion of the Secretary of War and under such regulations as he may prescribe, of rifle ranges owned or controlled by the United States of America. *Act of June 14, 1917 (40 Stat. 181).*

2572. Instruction camps.—Under such regulations as the President may prescribe the Secretary of War may provide camps for the instruction of officers and enlisted men of the National Guard. Such camps shall be conducted by officers of the Regular Army detailed by the Secretary of War for that purpose, and may be located either within or without the State, Territory, or District of Columbia to which the members of the National Guard designated to attend said camps shall belong. Officers and enlisted men attending such camps shall be entitled to pay and transportation, and enlisted men to subsistence in addition, at the same rates as for encampments or maneuvers for field or coast-defense instruction. *Sec. 97, act of June 3, 1916 (39 Stat. 207).*

Provision for this purpose has been made regularly in support of the Army acts.

2573. Instructors at camps.—The Secretary of War may detail one or more officers and enlisted men of the Regular Army to attend any encampment, maneuver, or other exercise for field or coast-defense instruction of the National Guard, who shall give such instruction and information to the officers and men assembled for such encampment, maneuver, or other exercise as may be directed by the Secretary of War or requested by the governor or by the commanding officer of the National Guard there on duty. *Sec. 96, act of June 3, 1916 (39 Stat. 207).*

* * * Such officer or officers shall immediately make a report of such encampment to the Secretary of War, who shall furnish a copy thereof to the governor of the State or Territory. *Sec. 19, act of Jan. 21, 1903 (32 Stat. 778).*

Sec. 96, above, may be regarded as superseding a similar provision of sec. 19 of the militia act of Jan. 21, 1903 (32 Stat. 778), except that portion of the latter which is given above.

2574. Participation in maneuvers of the Regular Army.—Under such regulations as the President may prescribe the Secretary of War is authorized to

provide for the participation of the whole or any part of the National Guard in encampments, maneuvers, or other exercises, including outdoor target practice, for field or coast-defense instruction, either independently or in conjunction with any part of the Regular Army, and there may be set aside from the funds appropriated for that purpose and allotted to any State, Territory, or the District of Columbia, such portion of said funds as may be necessary for the payment, subsistence, transportation, and other proper expenses of such portion of the National Guard of such State, Territory, or the District of Columbia as shall participate in such encampments, maneuvers, or other exercises, including outdoor target practice, for field and coast-defense instruction; and the officers and enlisted men of such National Guard while so engaged shall be entitled to the same pay, subsistence, and transportation as officers and enlisted men of corresponding grades of the Regular Army are or hereafter may be entitled by law. *Sec. 94, act of June 3, 1916 (39 Stat. 206).*

This probably superseded sec. 15, act of Jan. 21, 1903 (32 Stat. 777), as amended by sec. 9, act of May 27, 1908 (35 Stat. 402), and act of Apr. 21, 1910 (36 Stat. 329), reading as follows: "The Secretary of War is authorized to provide for participation by any part of the organized militia of any State, Territory, or the District of Columbia, on the request of the governor of a State or Territory, or the commanding-general of the militia of the District of Columbia, in the encampments, maneuvers, and field instruction of any part of the Regular Army, at or near any military post or camp or lake or sea-coast defenses of the United States. In such case the organized militia so participating shall receive the same pay, subsistence, and transportation as is provided by law for the officers and men of the Regular Army, and no part of the sums appropriated for the support of the Regular Army shall be used to pay any part of the expenses of the organized militia of any State or Territory or the District of Columbia, while engaged in joint encampments, maneuvers, and field instruction of the Regular Army and militia: *Provided*, That the Secretary of War is authorized, under requisition of the governor of a State or Territory or the commanding-general of the militia of the District of Columbia, to pay to the quartermaster-general, or such other officer of the militia as may be duly designated and appointed for the purpose, so much of its allotment, under the annual appropriation authorized by section sixteen hundred and sixty-one, Revised Statutes, as amended, as shall be necessary for the payment, subsistence, transportation, and other expenses of such portion of the organized militia as may engage in encampments, maneuvers, and field instruction with any part of the Regular Army at or near any military post or camp or lake or sea-coast defenses of the United States, and the Secretary of War shall forward to Congress, at each session next after said encampments, a detailed statement of the expense of such encampments and maneuvers: *Provided*, That the command of such military post or camp and the officers and troops of the United States there stationed shall remain with the regular commander of the post without regard to the rank of the commanding or other officers of the militia temporarily so encamped within its limits or in its vicinity: *Provided further* That except as herein specified the right to command during joint encampments, maneuvers, and field instruction shall be governed by the rules set out in Articles One hundred and twenty-two and One hundred and twenty-four of the rules and articles for the government of the armies of the United States."

Provision for this purpose has been made regularly in support of the Army acts.

Any portion of the National Guard participating in encampments, etc., under the provisions of this act, may be paid at any time after being duly mustered by sec. 98 of this act, 2598, post.

Notes of Decisions.

Providing for participation in encampment, maneuvers, etc.—The Secretary of War, under this section, is authorized to provide for participation by the Organized Militia in the encampment, maneuvers, and field instructions of any part of the Regular Army, on request of the governor of the State concerned, and the terms of the

statute were complied with in the particular case. *Alabama Great Southern R. Co. v. U. S. (1914), 49 Ct. Cl. 522, 529.*

Longevity pay.—The statute does not entitle an officer to credit for service in the State militia as a basis for longevity pay. *Bowie v. U. S. (1909), 45 Ct. Cl. 42.*

2575. Command of joint maneuvers with the Regular Army.—When any part of the National Guard participates in encampments, maneuvers, or other exercises, including outdoor target practice, for field or coast-defense instruction at a United States military post, or reservation, or elsewhere, if in conjunction with troops of the United States, the command of such military post or reservation and of the officers and troops of the United States on duty there or elsewhere shall remain with the commander of the United States troops without regard to the rank of the commanding or other officer of the National Guard temporarily engaged in the encampments, maneuvers, or other exercises. *Sec. 95, act of June 3, 1916 (39 Stat. 207).*

Notes of Decisions.

Distinction between Regulars and militia as to command.—Sec. 15 of the act of Jan. 21, 1903, implies a distinction between "the troops of the United States" stationed at a military post and "the militia temporarily encamped" there for instruction, in

its provision that the regular commander of the post shall remain in command without regard to the rank of the commanding officers of the militia present. *Alabama Great Southern R. Co. v. U. S. (1914), 49 Ct. Cl. 522.*

2576. Officers on duty with Regular Army.— * * * The President may also assign, with their consent, and within the limits of the appropriations previously made for this specific purpose, not exceeding five hundred officers of the National Guard, who hold reserve commissions, to duty with the Regular Army, in addition to those attending service schools; and while so assigned they shall receive the same pay and allowances as Regular Army officers of like grades, to be paid out of the whole fund appropriated for the support of the militia. *Sec. 81, act of June 3, 1916 (39 Stat. 203), as amended by sec. 44, act of June 4, 1920 (41 Stat. 782).*

2577. Leaves of absence for Government employees engaged in training.—All officers and employees of the United States and of the District of Columbia who shall be members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be engaged in field or coast-defense training ordered or authorized under the provisions of this Act. *Sec. 80, act of June 3, 1916 (39 Stat. 203).*

This section probably superseded sec. 40, act of Mar. 1, 1889 (25 Stat. 779), which was as follows:

"All officers and employees of the United States and of the District of Columbia who are members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay or time, on all days of any parade or encampment ordered or authorized under the provisions of this Act."

2578. Federal aid.—Whenever any State shall, within a limit of time to be fixed by the President, have failed or refused to comply with or enforce any requirement of this Act, or any regulation promulgated thereunder and in aid thereof by the President or the Secretary of War, the National Guard of such State shall be debarred, wholly or in part, as the President may direct, from receiving from the United States any pecuniary or other aid, benefit, or privilege authorized or provided by this Act or any other law. *Sec. 116, act of June 3, 1916 (39 Stat. 212).*

2579. Inspections.—The Secretary of War shall cause an inspection to be made at least once each year by inspectors general and if necessary by other officers of the Regular Army detailed by him for that purpose to determine whether the amount and condition of the property in the hands of the

National Guard is satisfactory; whether the National Guard is organized as hereinbefore prescribed; whether the officers and enlisted men possess the physical and other qualifications prescribed; whether the organization and the officers and enlisted men thereof are sufficiently armed, uniformed, equipped, and being trained and instructed for active duty in the field or coast defense, and whether the records are being kept in accordance with the requirements of this Act. The reports of such inspections shall serve as the basis for deciding as to the issue to and retention by the National Guard of the military property provided for by this Act, and for determining what organizations and individuals shall be considered as constituting parts of the National Guard within the meaning of this Act. *Sec. 93, act of June 3, 1916 (39 Stat. 206).*

This section and sec. 67, act of June 3, 1916 (39 Stat. 200), as amended by act of July 9, 1918 (40 Stat. 878), probably superseded sec. 14, act of Jan. 21, 1903 (32 Stat. 777), which was as follows: "Whenever it shall appear by the report of inspections, which it shall be the duty of the Secretary of War to cause to be made at least once in each year by officers detailed by him for that purpose, that the organized militia of a State or Territory or of the District of Columbia is sufficiently armed, uniformed, and equipped for active duty in the field, the Secretary of War is authorized, on the requisition of the governor of such State or Territory, to pay to the quarter-master-general thereof, or to such other officer of the militia of said State as the said governor may designate and appoint for the purpose, so much of its allotment out of the said annual appropriation under section sixteen hundred and sixty-one of the Revised Statutes as amended as shall be necessary for the payment, subsistence, and transportation of such portion of said organized militia as shall engage in actual field or camp service for instruction, and the officers and enlisted men of such militia while so engaged shall be entitled to the same pay, subsistence and transportation or travel allowances as officers and enlisted men of corresponding grades of the Regular Army are or may hereafter be entitled by law, and the officer so designated and appointed shall be regarded as a disbursing officer of the United States, and shall render his accounts through the War Department to the proper accounting officers of the Treasury for settlement, and he shall be required to give good and sufficient bonds to the United States, in such sums as the Secretary of War may direct, faithfully to account for the safe-keeping and payment of the public moneys so intrusted to him for disbursement."

2580. Appointment of property and disbursing officers.— * * * The governor of each State and Territory and the Commanding General of the National Guard of the District of Columbia shall appoint, designate, or detail, subject to the approval of the Secretary of War, the Adjutant General or an officer of the National Guard of the State, Territory, or District of Columbia, who shall be regarded as property and disbursing officer of the United States. *Sec. 67, act of June 3, 1916 (39 Stat. 200), as amended by chap. III, act of July 9, 1918 (40 Stat. 878).*

2581. Duties of property and disbursing officers.— * * * He shall receipt and account for all funds and property belonging to the United States in possession of the National Guard of his State, Territory, or District, and shall make such returns and reports concerning the same as may be required by the Secretary of War. The Secretary of War is authorized, on the requisition of the governor of a State or Territory or the commanding general of the National Guard of the District of Columbia, to pay to the property and disbursing officer thereof so much of its allotment out of the annual appropriation for the support of the National Guard as shall, in the judgment of the Secretary of War, be necessary for the purposes enumerated therein. He shall render, through the War Department, such accounts of Federal funds intrusted to him for disbursement as may be required by the Treasury Department. Before entering upon the performance of his duties as property and disbursing officer he shall be required to give good and sufficient bond to the United States, the amount

thereof to be determined by the Secretary of War, for the faithful performance of his duties and for the safe-keeping and proper disposition of the Federal property and funds intrusted to his care. He shall, after having qualified as property and disbursing officer, receive pay for his services at a rate to be fixed by the Secretary of War, and such compensation shall be a charge against the whole sum annually appropriated for the support of the National Guard:

* * * *Sec. 67, act of June 3, 1916 (39 Stat. 200).*

2582. Inspection of the accounts of the property and disbursing officers.—
* * * *Provided further*, That the Secretary of War shall cause an inspection of the accounts and records of the property and disbursing officer to be made by an inspector general of the Army at least once each year. * * * *Sec. 67, act of June 3, 1916 (39 Stat. 200).*

2583. Regulations for property and disbursing officers.— * * * *And provided further*, That the Secretary of War is empowered to make all rules and regulations necessary to carry into effect the provisions of this section. *Sec. 67, act of June 3, 1916 (39 Stat. 200).*

2584. Annual appropriation.—A sum of money shall hereafter be appropriated annually, to be paid out of any money in the Treasury not otherwise appropriated, for the support of the National Guard, including the expense of providing arms, ordnance stores, quartermaster stores, and camp equipage, and all other military supplies for issue to the National Guard, and such other expenses pertaining to the said guard as are now or may hereafter be authorized by law. * * * *Sec. 67, act of June 3, 1916 (39 Stat. 199).*

* * * *Provided*, That all the moneys hereinbefore appropriated for the arming, equipping, and training of the National Guard shall be disbursed and accounted for as one fund. *Act of June 5, 1930 (41 Stat. 973), making appropriations for the support of the Army: National Guard.*

Sec. 67 superseded sec. 2, act of Feb. 12, 1887 (24 Stat. 402), as amended by sec. 2, act of June 22, 1906 (34 Stat. 449), which read as follows: "Said appropriation shall be apportioned among the several States and Territories, under the direction of the Secretary of War, according to the number of Senators and Representatives to which each State respectively is entitled in the Congress of the United States, and to the Territories and District of Columbia such proportion and under such regulations as the President may prescribe: Provided, however, That no State shall be entitled to the benefits of the appropriation apportioned to it unless the number of its regularly enlisted, organized, and uniformed active militia shall be at least one hundred men for each Senator and Representative to which such State is entitled in the Congress of the United States. And the amount of said appropriation which is thus determined not to be available shall be covered back into the Treasury: Provided also, That the sums so apportioned among the several States and Territories and the District of Columbia shall be available for the purposes named in section fourteen of the Act of January twenty-first, nineteen hundred and three, for the actual excess of expenses of travel in making the inspections therein provided for over the allowances made for same by law; for the promotion of rifle practice, including the acquisition, construction, maintenance, and equipment of shooting galleries and suitable target ranges; for the hiring of horses and draft animals for the use of mounted troops, batteries, and wagons; for forage for the same and for such other incidental expenses in connection with encampments, maneuvers and field instruction provided for in sections fourteen and fifteen of the said Act of January twenty-first, nineteen hundred and three, as the Secretary of War may deem necessary."

This section also superseded a proviso annexed to an appropriation for manufacture, repair, and issue of arms at the national armories, in the Army appropriation act for the fiscal year 1891, act of June 13, 1890 (26 Stat. 156), which was as follows: "Hereafter the cost to the Ordnance Department of all ordnance and ordnance stores issued to the States, Territories, and District of Columbia, under the act of February twelfth, eighteen hundred and eighty-seven, shall be credited to the appropriation for 'manufac-

ture of arms at national armories,' and used to procure like ordnance stores, and that said appropriation shall be available until exhausted, not exceeding two years."

Funds for supplies and equipment for the militia were formerly provided by R. S. 1661, as amended by sec. 1, act of June 22, 1906 (34 Stat. 449), which authorized an annual appropriation of \$2,000,000, available until expended; but the act of May 12, 1917 (40 Stat. 36), directed that any of such funds remaining to the credit of any State, the Territory of Hawaii, or the District of Columbia, should remain available only to the end of the fiscal year 1918.

Current provision for the National Guard regularly appears in acts making appropriations for the support of the Army.

2585. Annual estimate for appropriations.—The Secretary of War shall cause to be estimated annually the amount necessary for carrying out the provisions of so much of this Act as relates to the militia, and no money shall be expended under said provisions except as shall from time to time be appropriated for carrying them out. *Sec. 119, act of June 3, 1916 (39 Stat. 213).*

2586. Expenses payable from the general fund.— * * * *Provided*, That the sum so apportioned among the several States, Territories, and the District of Columbia, shall be available under such rules as may be prescribed by the Secretary of War for the actual and necessary expenses incurred by officers and enlisted men of the Regular Army when traveling on duty in connection with the National Guard; for the transportation of supplies furnished to the National Guard for the permanent equipment thereof; for office rent and necessary offices expenses of officers of the Regular Army on duty with the National Guard; for the expenses of the Militia Bureau, including clerical services, now authorized for the Division of Militia Affairs; for expenses of enlisted men of the Regular Army on duty with the National Guard, including quarters, fuel, light, medicines, and medical attendance; and such expenses shall constitute a charge against the whole sum annually appropriated for the support of the National Guard, and shall be paid therefrom and not from the allotment duly apportioned to any particular State, Territory, or the District of Columbia; * * * *Sec. 67, act of June 3, 1916 (39 Stat. 199).*

The arms transmitted to the States under the laws which are embodied in secs. 1661, 1667, and 1670 of the Revised Statutes are, in contemplation of the provisions thereof, to be held by the States for a specific purpose only, which is pointed out therein; hence, they become invested with nothing more than a qualified property in such arms; and they can not, as a matter of right, and without interfering with the regulations of Congress on a subject over which its authority is paramount, make any disposition or use of such arms which defeats the purpose referred to. (14 Opn. Att. Gen., 491.) Congress, by the act of Feb. 12, 1887 (24 Stat. 401), has provided a system of accountability for the several States in respect to the arms, ammunition, equipage and other public property issued to the States for the use of the militia. See 2610, post.

2587. Apportionment of funds.— * * * The appropriation provided for in this section shall be apportioned among the several States and Territories under just and equitable procedure to be prescribed by the Secretary of War and in direct ratio to the number of enlisted men in active service in the National Guard existing in such States and Territories at the date of apportionment of said appropriation, and to the District of Columbia, under such regulations as the President may prescribe: * * * *Sec. 67, act of June 3, 1916 (39 Stat. 199).*

2588. Expenses payable out of the allotment to a State.— * * * *Provided*, That the sum so apportioned among the several States, Territories, and the District of Columbia, shall be available under such rules as may be prescribed by the Secretary of War * * * for the promotion of rifle practice, including the acquisition, construction, maintenance, and equipment of shooting gal-

leries and suitable target ranges; for the hiring of horses and draft animals for the use of mounted troops, batteries, and wagons; for forage for the same; and for such other incidental expenses in connection with lawfully authorized encampments, maneuvers, and field instruction as the Secretary of War may deem necessary; and for such other expenses pertaining to the National Guard as are now or may hereafter be authorized by law. * * * *Sec. 67, act of June 3, 1916 (39 Stat. 199).*

2589. Appropriation for joint maneuvers with the Regular Army.—To provide for the participation of the whole or any part of the National Guard in encampments, maneuvers, or other exercises, including outdoor target practice and field and coast defense instruction, either independently or in conjunction with any part of the Regular Army, and there may be set aside from the funds apportioned for that purpose and allotted to any State, Territory, or the District of Columbia such portion of said funds as may be necessary for the payment, subsistence, transportation, and other proper expenses of such portion of the National Guard of said State, Territory, or the District of Columbia as shall participate in such encampments, maneuvers, or other exercises, including outdoor target practice and field and coast defense instruction; and the officers and enlisted men of such National Guard while so engaged shall be entitled to the same pay, subsistence, and transportation as officers and enlisted men of corresponding grades of the Regular Army are or hereafter may be entitled to by law. * * * *Act of July 9, 1918 (40 Stat. 874).*

Similar provision appears in previous appropriation acts. Recent Army appropriation acts provide "for expenses, camps of instruction," under "National Guard."

2590. Appropriation for camps of instruction.— * * * To provide for camps of instruction for the instruction of officers and enlisted men of the National Guard. Such camps shall be conducted by officers of the Regular Army detailed by the Secretary of War for the purpose, and may be located either within or without the State, Territory, or District of Columbia to which the members of the National Guard designated to attend said camps shall belong. Officers and enlisted men attending such camps shall be entitled to pay and transportation and enlisted men to subsistence in addition at the same rate as for encampments or maneuvers for field and coast defense instruction: *Provided*, That of this sum so much thereof as may be necessary is authorized to be expended for the payment of transportation of troops of the Regular Army in connection with joint camps of instruction of the National Guard: *Provided*, That of this sum as much thereof as may be necessary is authorized to be expended for the pay, transportation, and subsistence of officers and enlisted men of the National Guard Reserve as may be authorized by the Secretary of War under the law to attend encampments, maneuvers, or other exercises of the National Guard, \$2,473,650. *Act of July 9, 1918 (40 Stat. 874).*

Similar provision appears in previous appropriation acts.

2591. Disbursement of pay by the Quartermaster Corps.— * * * All amounts appropriated for the purpose of this and the last preceding section shall be disbursed and accounted for by the officers and agents of the Quartermaster Corps of the Army, and all disbursements under the foregoing provisions of this section shall be made as soon as practicable after the thirty-first day of December and the thirtieth day of June of each year upon pay rolls prepared

and authenticated in the manner to be prescribed by the Secretary of War.
 * * * *Sec. 110, act of June 3, 1916 (39 Stat. 210).*

But see 497, ante.

2592. Purchase of travel rations.— * * * *Provided further*, That officers of the organized militia who may hereafter be furnished, under proper authority, with funds for the purchase of coffee, or other components of the travel ration for the use of their respective commands, shall not be required to furnish bonds for the safe-keeping and disbursement of the same. *Act of May 11, 1908 (35 Stat. 117).*

2593. Rates of pay of commissioned officers.—Captains and lieutenants belonging to organizations of the National Guard shall receive compensation at the rate of one-thirtieth of the monthly base pay of their grades as prescribed for the Regular Army for each regular drill or other period of instruction authorized by the Secretary of War, not exceeding five in any one calendar month, at which they shall have been officially present for the entire required period, and at which at least 50 per centum of the commissioned strength and 60 per centum of the enlisted strength attend and participate for not less than one and one-half hours. Captains commanding organizations shall receive \$240 a year in addition to the drill pay herein prescribed. Officers above the grade of captain shall receive not more than \$500 a year, and officers below the grade of major, not belonging to organizations, shall receive not more than four-thirtieths of the monthly base pay of their grades for satisfactory performance of their appropriate duties under such regulations as the Secretary of War may prescribe. Pay under the provisions of this section shall not accrue to any officer during a period when he shall be lawfully entitled to the same pay as an officer of corresponding grade in the Regular Army: * * * *Sec. 109, act of June 3, 1916 (39 Stat. 209), as amended by sec. 47, act of June 4, 1920 (41 Stat. 783).*

See also 78, ante, as to dual salaries.

2594. Vacant.

2595. Pay for attendance at drills.—Each enlisted man belonging to an organization of the National Guard shall receive compensation at the rate of one-thirtieth of the initial monthly pay of his grade in the Regular Army for each drill ordered for his organization where he is officially present and in which he participates for not less than one and one-half hours, not exceeding eight in any one calendar month, and not exceeding sixty drills in one year: *Provided*, That no enlisted man shall receive any pay under the provisions of this section for any month in which he shall have attended less than 60 per centum of the drills or other exercises prescribed for his organization: *Provided further*, That the proviso contained in section 92 of this Act shall not operate to prevent the payment of enlisted men actually present at any duly ordered drill or other exercise: *And provided further*, That periods of any actual military duty equivalent to the drills herein prescribed (except those periods of service for which members of the National Guard may become lawfully entitled to the same pay as officers and enlisted men of the corresponding grades in the Regular Army) may be accepted as service in lieu of such drills when so provided by the Secretary of War. *Sec. 110, act of June 3, 1916 (39 Stat. 209), as amended by sec. 48, act of June 4, 1920 (41 Stat. 784).*

2596. Stoppage of pay.— * * * *Provided*, That stoppages may be made against the compensation payable to any officer or enlisted man hereunder to cover the cost of public property lost or destroyed by and chargeable to such officer or enlisted man. * * * *Sec. 110, act of June 3, 1916 (39 Stat. 210).*

2597. Restrictions on payment of the National Guard.— * * * Except as otherwise specifically provided herein, no money appropriated under the provisions of this or the last preceding section shall be paid to any person not on the active list, nor to any person over sixty-four years of age, nor to any person who shall fail to qualify as to fitness for military service under such regulations as the Secretary of War shall prescribe, nor to any State, Territory, or District, or officer or enlisted man in the National Guard thereof, unless and until such State, Territory, or District provides by law that staff officers, including officers of the Pay, Inspection, Subsistence, and Medical Departments, hereafter appointed, shall have had previous military experience and shall hold their positions until they shall have reached the age of sixty-four years, unless retired prior to that time by reason of resignation, disability, or for cause to be determined by a court-martial legally convened for that purpose, and that vacancies among said officers shall be filled by appointment from the officers of the militia of such State, Territory, or District: *Provided further*, That the preceding proviso shall not apply to any State, Territory, or District until sixty days next after the adjournment of the next session of its legislature held after the approval of this Act. *Sec. 110, act of June 3, 1916 (39 Stat. 210).*

2598. Pay of the National Guard when participating in maneuvers.—When any portion of the National Guard shall participate in encampments, maneuvers, or other exercises, including outdoor target practice, for field or coast-defense instruction, under the provisions of this Act, it may, after being duly mustered, be paid at any time after such muster for the period from the date of leaving the home rendezvous to date of return thereto as determined in advance, both dates inclusive; and such payment, if otherwise correct, shall pass to the credit of the disbursing officer making the same. *Sec. 98, act of June 3, 1916 (39 Stat. 207).*

This section superseded a proviso of the Army appropriation act for the fiscal year 1907, act of June 12, 1906 (34 Stat. 249), as follows: "Hereafter when any portion of the organized militia of any State, Territory, or the District of Columbia participates in the encampment, maneuvers, and field instruction of any part of the Regular Army, under the provisions of section fifteen of the Act of January twenty-first, nineteen hundred and three, they may, after being duly mustered by an officer of the Regular Army, be paid at any time after such muster for the period from the date of leaving the home rendezvous to date of return thereto as determined in advance, both dates inclusive, and such payment, if otherwise correct, shall pass to the credit of the paymaster making the same."

2599. Pay of the National Guard Reserve.— * * * *Provided*, That members of said reserve, officers and enlisted men, when engaged in field or coast defense training with the active National Guard, shall receive the same Federal pay and allowances as those occupying like grades on the active list of said guard when likewise engaged: *Provided further*, That, except as otherwise specifically provided in this Act, no commissioned or enlisted reservist shall receive any pay or allowances out of any appropriation made by Congress for National Guard purposes. *Sec. 78, act of June 3, 1916 (39 Stat. 202), as amended by sec. 42, act of June 4, 1920 (41 Stat. 782).*

2600. Traveling expenses of property and disbursing officers.— * * * *Provided*, That when travelling in the performance of his official duties under

orders issued by the proper authorities he shall be reimbursed for his actual necessary traveling expenses, the sum to be made a charge against the allotment of the State, Territory, or District of Columbia: * * * *Sec. 67, act of June 3, 1916 (39 Stat. 290).*

2901. Reduced rates of transportation.— * * * *Provided further, That hereafter nothing in the Act of February fourth, eighteen hundred and eighty-seven, known as the Act to regulate commerce, or any amendments thereto, shall be construed to prohibit any common carrier from giving reduced rates for members of National Guard organizations traveling to and from joint encampments with the Regular Army. Act of Aug. 29, 1916 (39 Stat. 646).*

2902. Arms, equipment, and uniform to be same as for Regular Army.—The National Guard of the United States shall, as far as practicable, be uniformed, armed, and equipped with the same type of uniforms, arms, and equipments as are or shall be provided for the Regular Army. *Sec. 82, act of June 3, 1916 (39 Stat. 203).*

See 2728, post, as to wearing the uniform of the National Guard.

The wearing of the duly prescribed uniform of the United States Army, Navy, or Marine Corps, or any distinctive part of such uniform, or a uniform similar in any part to a distinctive part of said duly prescribed uniforms, by any person not an officer or enlisted man of the United States Army, Navy, or Marine Corps, was prohibited by sec. 125 of this act, 2728, post. Said prohibition was not to be construed so as to prevent officers and enlisted men of the National Guard from wearing, in pursuance of law and regulations, the uniform lawfully prescribed to be worn by such officers and enlisted men of the National Guard, by a proviso annexed to said section. Said section, in a further proviso, provided that the uniforms worn by officers or enlisted men of the National Guard should include some distinctive mark or insignia to be prescribed by the Secretary of War to distinguish such uniforms from the uniform of the United States Army, Navy, and Marine Corps.

2903. Procurement and issue of arms, equipment and clothing.—The Secretary of War is hereby authorized to procure, under such regulations as the President may prescribe, by purchase or manufacture, within the limits of available appropriations made by Congress, and to issue from time to time to the National Guard, upon requisition of the governors of the several States and Territories or the commanding general of the National Guard of the District of Columbia, such number of United States service arms, with all accessories, field artillery matériel, engineer, coast artillery, signal and sanitary matériel, accouterments, field uniforms, clothing, equipage, publications, and military stores of all kinds, including public animals, as are necessary to arm, uniform, and equip for field service the National Guard in the several States, Territories, and the District of Columbia: * * * *Sec. 83, act of June 3, 1916 (39 Stat. 203).*

Appropriations for the supply of the National Guard are made regularly in acts for the support of the Army.

This section is part of sec. 83 of the national defense act. Sections 83, 84, 85, of the national defense act, probably supersede sec. 13, act of Jan. 21, 1903 (32 Stat. 777), as amended by sec. 8, act of May 27, 1908 (35 Stat. 401), which was as follows:

"The Secretary of War is hereby authorized to procure, by purchase or manufacture, and issue from time to time to the organized militia, under such regulations as he may prescribe, such number of the United States service arms, together with all accessories and such other accouterments, equipments, uniforms, clothing, equipage, and military stores of all kinds required for the Army of the United States, as are necessary to arm, uniform, and equip all of the organized militia in the several States, Territories, and the District of Columbia, in accordance with the requirements of this Act, without charging the cost or value thereof, or any expense connected therewith, against the allotment of said State, Territory, or the District of Columbia, out of the annual appropriation provided by section sixteen hundred and sixty-one of the Revised Statutes as amended, or requiring payment therefor, and to exchange, without receiving any money

credit therefor, ammunition or parts thereof suitable to the new arms, round for round, for corresponding ammunition suitable to the old arms heretofore issued to said State, Territory, or the District of Columbia by the United States: *Provided*, That said property shall remain the property of the United States, except as hereinafter provided, and be annually accounted for by the governors of the States and Territories as required by law, and that each State, Territory, and the District of Columbia shall, on receipt of new arms or equipments, turn in to the War Department, or otherwise dispose of in accordance with the directions of the Secretary of War, without receiving any money credit therefor and without expense for transportation, all United States property so replaced or condemned. When the organized militia is uniformed as above required, the Secretary of War is authorized to fix an annual clothing allowance to each State, Territory, and the District of Columbia for each enlisted man of the organized militia thereof, and thereafter issues of clothing to such States, Territories, and the District of Columbia shall be in accordance with such allowance, and the governors of the States and Territories and the commanding general of the militia of the District of Columbia shall be authorized to drop from their returns each year as expended clothing corresponding in value to such allowance. The Secretary of War is hereby further authorized to issue from time to time to the organized militia, under such regulations as he may prescribe, small arms and artillery ammunition upon the requisition of the governor, in the proportion of fifty per centum of the corresponding Regular Army allowance, without charge to the State's allotment from the appropriation under section sixteen hundred and sixty-one, Revised Statutes, as amended. To provide means to carry into effect the provisions of this section, the necessary money to cover the cost of procuring, exchanging, or issuing of arms, accouterments, equipments, uniforms, clothing, equipage, ammunition, and military stores to be exchanged or issued hereunder is hereby appropriated out of any money in the Treasury not otherwise appropriated: *Provided*, That the sum expended in the execution of the purchases and issues provided for in this section shall not exceed the sum of two million dollars in any fiscal year: *Provided also*, That the Secretary of War shall annually submit to Congress a report of expenditures made by him in the execution of the requirements of this section."

2604. Supplying new type equipment, etc.—Under such regulations as the President may prescribe, whenever a new type of equipment, small arm, or field gun shall have been issued to the National Guard of the several States, Territories, and the District of Columbia, such equipment, small arms, and field guns, including all accessories, shall be furnished without charging the cost or value thereof or any expense connected therewith against the appropriations provided for the support of the National Guard. *Sec. 84, act of June 3, 1916 (39 Stat. 204).*

See also 2612, post.

2605. New types of small arms.—It shall be the duty of the Secretary of War, whenever a new type of small arm shall have been adopted for the use of the Regular Army, and when a sufficient quantity of such arms shall have been manufactured to constitute, in his discretion, an adequate reserve for the armament of any regular and volunteer forces that it may be found necessary to raise in case of war, to cause the organized militia of the United States to be furnished with small arms of the type so adopted, with bayonets and the necessary accouterments and equipments, including ammunition therefor: *Provided*, That such issues shall be made in the manner provided in section thirteen of the Act approved January twenty-first, nineteen hundred and three, entitled "An Act to promote the efficiency of the militia, and for other purposes." *Act of Mar. 2, 1907 (34 Stat. 1174).*

See also 2612, post.

The proviso at the end of this section was probably superseded by secs. 83, 84, 85, of the national defense act of June 3, 1916 (39 Stat. 203-204), 2603, 2604, ante, 2606, post.

2606. Exchange of obsolete equipment, etc., for new type.—Each State, Territory, and the District of Columbia shall, on the receipt of new property issued

to replace obsolete or condemned prior issues, turn in to the War Department or otherwise dispose of, in accordance with the directions of the Secretary of War, all property so replaced or condemned, and shall not receive any money credit therefor. *Sec. 85, act of June 3, 1916 (39 Stat. 204).*

2607. Issue of Infantry equipment M. 1910 in place of obsolete type.— * * * *Provided*, That whenever in the opinion of the Secretary of War a sufficient number of Infantry equipment, model of nineteen hundred and ten, shall have been procured and shall be available for the purpose the Secretary of War is hereby authorized to issue on the requisition of the governors of the several States and Territories or the commanding general of the District of Columbia National Guard, such numbers thereof as are required for equipping the National Guard in said States, Territories, and the District of Columbia, without charging the cost or value thereof or any expenses connected therewith, against any allotment to said States, Territories, or the District of Columbia, provided that the equipment thus issued shall be receipted for and shall remain the property of the United States and be annually accounted for in the manner prescribed by the Act of June third, nineteen hundred and sixteen, and that each State, Territory, and the District of Columbia shall, upon receipt of new equipment, turn in to the Ordnance Department of the United States Army, without receiving any money credit therefor and without expense for transportation of Infantry equipment now in its possession, the property of the United States, and replaced by articles of the model of nineteen hundred and ten equipment, * * * *Act of May 12, 1917 (40 Stat. 68), making appropriations for the support of the Army: National Guard.*

This provision is similar to that contained in the act of Aug. 29, 1916 (39 Stat. 647), except, where the words, "in the manner prescribed by the act of June third, nineteen hundred and sixteen," are here used, the words, "by the governors of the several States, Territories, and commanding general of the District of Columbia National Guard as now required by law" are there used.

2608. Issue of automatic pistols in place of revolvers.— * * * *Provided*, That whenever in his opinion a sufficient number of automatic pistols of the standard service type, holsters, and pistol-cartridge boxes therefor, shall have been procured and be available for the purpose, the Secretary of War is hereby authorized to issue, on the requisition of the governors of the several States and Territories, or of the commanding general of the Militia of the District of Columbia, such number of standard pistols, holsters, and pistol-cartridge boxes therefor as are required for arming all of the Organized Militia in said States, Territories, and District of Columbia, without charging the cost or value thereof, or any expense connected therewith, against the allotment to said State, Territory, or District of Columbia, out of the annual appropriation provided by section sixteen hundred and sixty-one of the Revised Statutes, as amended, or requiring payment therefor, and to exchange, without receiving any money credit therefor, ammunition, or parts thereof, suitable to the new standard pistol, round for round, for corresponding ammunition suitable to the old revolver theretofore issued to said States, Territory, or District by the United States: *Provided*, That the said standard pistols, holsters, and pistol-cartridge boxes therefor shall be receipted for and shall remain the property of the United States and be annually accounted for by the governors of the States and Territories and the commanding general of the Militia of the District of Columbia as now required by law, and that each State, Territory, and District shall, on receipt of the new pistols, holsters, and pistol-cartridge boxes, and ammunition, turn into the Ordnance Department of the United States Army, with-

out receiving any money credit therefor and without expense for transportation, all United States revolvers and ammunition therefor, holsters, and revolver-cartridge boxes now in its possession.

To provide means to carry into effect the foregoing provisions, the necessary money, not to exceed three hundred thousand dollars, to recover the cost of exchanging or issuing the new pistols, ammunition therefor, holsters, and pistol-cartridge boxes to be exchanged or issued hereunder, is hereby appropriated out of any moneys in the Treasury not otherwise appropriated. *Act of Mar. 3, 1911 (36 Stat. 1057).*

The portion of this section referring to R. S. 1661, was superseded by the provision for annual appropriation in sec. 67 of the national defense act of June 3, 1916, act forth 2584, ante.

2609. Care and protection of stores.— * * * *Provided*, That as a condition precedent to the issue of any property as provided for by this Act, the State, Territory, or the District of Columbia desiring such issue shall make adequate provision, to the satisfaction of the Secretary of War, for the protection and care of such property: * * * *Sec. 83, act of June 3, 1916 (39 Stat. 204).*

2610. Accounting for stores.—That the purchase or manufacture of arms, ordnance stores, quartermaster stores, and camp equipage for the militia under the provisions of this Act shall be made under the direction of the Secretary of War, as such arms, ordnance and quartermaster stores, and camp equipage are now manufactured or otherwise provided for the use of the Regular Army, and they shall be receipted for and shall remain the property of the United States, and be annually accounted for by the governors of the States and Territories and by the commanding general of the National Guard of the District of Columbia, for which purpose the Secretary of War shall prescribe and supply the necessary blanks and make such regulations as he may deem necessary to protect the interests of the United States. *R. S. 1661, as amended by sec. 3, act of June 22, 1906 (34 Stat. 450).*

2611. Purchase of stores from any supply bureau of the War Department.— * * * *Provided further*, That whenever it shall be shown to the satisfaction of the Secretary of War that the National Guard of any State, Territory, or the District of Columbia, is properly organized, armed, and equipped for field service, funds allotted to that State, Territory, or District for the support of its National Guard may be used for the purchase, from the War Department, of any article issued by any of the supply departments of the Army. *Sec. 83, act of June 3, 1916 (39 Stat. 204).*

See 2617, post.

2612. Issue of clothing, equipment, etc., to the National Guard organized after the World War.—The Secretary of War is hereby authorized to issue from stores now on hand and purchased for the United States Army such articles of clothing and equipment matériel as may be needed by the National Guard organized under the provisions of the Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916. This issue shall be made without charge against militia appropriations and shall be reimbursed in kind for all Federal property brought into service by State troops: * * * *Act of July 11, 1919 (41 Stat. 126), making appropriations for the support of the Army: National Guard.*

* * * *And provided further*, That the Secretary of War is hereby directed to issue from surplus stores and matériel now on hand and purchased for the

United States Army such articles of clothing and equipment and Field Artillery matériel and ammunition as may be needed by the National Guard organized under the provisions of the Act entitled "An Act for making further and more effectual provisions for the national defense, and for other purposes," approved June 3, 1916. This issue shall be made without charge against militia appropriations. *Act of June 5, 1920 (41 Stat. 973), making appropriations for the support of the Army: National Guard.*

2613. Ammunition for target practice.—That the troops of the militia encamped at any military post or camp of the United States may be furnished such amounts of ammunition for instruction in firing and target practice as may be prescribed by the Secretary of War, and such instruction in firing shall be carried on under the direction of an officer selected for that purpose by the proper military commander. *Sec. 21, act of Jan. 21, 1903 (32 Stat. 779).*

2614. Equipment of coast artillery armories of the National Guard.—For the purchase of material, equipment, books of instruction, range finders, and fire-control equipment for the instruction and use of State coast artillery organizations, * * * dollars: *Provided, That in time of war, or threatened war, such equipment may, in the discretion of the Secretary of War, be withdrawn from armories or other places where it is in use by the State coast artillery organizations, and may be used in the fortifications of the United States. Act of Mar. 3, 1909 (35 Stat. 750).*

2615. Loss or damage of stores issued to the National Guard.—All military property issued to the National Guard as herein provided shall remain the property of the United States. Whenever any such property issued to the National Guard in any State or Territory or the District of Columbia shall have been lost, damaged, or destroyed, or become unserviceable or unsuitable by use in service or from any other cause, it shall be examined by a disinterested surveying officer of the Regular Army or the National Guard, detailed by the Secretary of War, and the report of such surveying officer shall be forwarded to the Secretary of War, or to such officer as he shall designate to receive such reports; and if it shall appear to the Secretary of War from the record of survey that the property was lost, damaged, or destroyed through unavoidable causes, he is hereby authorized to relieve the State or Territory or the District of Columbia from further accountability therefor. If it shall appear that the loss, damage, or destruction of property was due to carelessness or neglect, or that its loss, damage, or destruction could have been avoided by the exercise of reasonable care, the money value of such property shall be charged to the accountable State, Territory, or District of Columbia, to be paid from State, Territory, or District funds, or any funds other than Federal. If the articles so surveyed are found to be unserviceable or unsuitable, the Secretary of War shall direct what disposition, by sale or otherwise, shall be made of them; and if sold, the proceeds of such sale, as well as stoppages against officers and enlisted men, and the net proceeds of collections made from any person or from any State, Territory, or District to reimburse the Government for the loss, damage, or destruction of any property, shall be deposited in the Treasury of the United States as a credit to said State, Territory, or the District of Columbia, accountable for said property, and as a part of and in addition to that portion of its allotment set aside for the purchase of similar supplies, stores, or material of war: *Provided further, That if any State, Territory, or the District of Columbia shall neglect or refuse to pay, or to cause to be paid, the money equivalent of any loss, damage, or destruction of property*

charged against such State, Territory, or the District of Columbia by the Secretary of War after survey by a disinterested officer appointed as hereinbefore provided, the Secretary of War is hereby authorized to debar such State, Territory, or the District of Columbia from further participation in any and all appropriations for the National Guard until such payments shall have been made. *Sec. 87, act of June 3, 1916 (39 Stat. 204).*

This section superseded sec. 4, act of Feb. 12, 1887 (24 Stat. 402), as amended by sec. 4, act of June 22, 1906 (34 Stat. 450), which read as follows: "Whenever any property furnished to any State or Territory, or the District of Columbia, as hereinbefore provided, has been lost or destroyed, or has become unserviceable or unsuitable from use in service, or from any other cause, it shall be examined by a disinterested surveying officer of the organized militia, to be appointed by the governor of the State or Territory, or the commanding general of the National Guard of the District of Columbia, to whom the property has been issued, and his report shall be forwarded by said governor or commanding general direct to the Secretary of War, and if it shall appear to the Secretary of War from the record of survey that the property has been lost or destroyed through unavoidable causes, he is hereby authorized to relieve the State from further accountability therefor; if it shall appear that the loss or destruction of property was due to carelessness or neglect or that its loss could have been avoided by the exercise of reasonable care, the money value thereof shall be charged against the allotment to the States under section sixteen hundred and sixty-one of the Revised Statutes as amended. If the articles so surveyed are found to be unserviceable or unsuitable, the Secretary of War shall direct what disposition, by sale or otherwise, shall be made of them, except unserviceable clothing which shall be destroyed, and if sold the proceeds of such sale shall be covered into the Treasury of the United States."

The Secretary of War was authorized to relieve any State, Territory, or the District of Columbia from further accountability for all United States property issued thereto for the use of the Organized Militia thereof, which the records of the War Department show to have been lost or destroyed prior to December 31, 1911, by the Army appropriation act for the fiscal year 1917, act of Aug. 29, 1916.

2616. Proceeds of sales of condemned stores, stoppages of pay and payments for damaged stores.—The net proceeds of the sale of condemned stores issued to the National Guard and not charged to State allotments shall be covered into the Treasury of the United States, as shall also stoppages against officers and enlisted men, and the net proceeds of collections made from any person to reimburse the Government for the loss, damage, or destruction of said property not charged against the State allotment issued for the use of the National Guard. *Sec. 88, act of June 3, 1916 (39 Stat. 205).*

2617. Sale of Army stores to a State.—Any State, Territory, or the District of Columbia may, with the approval of the Secretary of War, purchase for cash from the War Department for the use of the National Guard, including the officers thereof, any stores, supplies, material of war, and military publications furnished to the Army, in addition to those issued under the provisions of this Act, at the price at which they shall be listed to the Army, with cost of transportation added. The funds received from such sale shall be credited to the appropriation to which they shall belong, shall not be covered into the Treasury, and shall be available until expended to replace therewith the supplies sold to the States in the manner herein authorized: * * * *Sec. 86, act of June 3, 1916 (39 Stat. 204).*

See 2611, ante.

This section probably superseded sec. 17, act of Jan. 21, 1903 (32 Stat. 778), which was as follows:

"The annual appropriation made by section sixteen hundred and sixty-one, Revised Statutes, as amended, shall be available for the purpose of providing for issue to the organized militia any stores and supplies or publications which are supplied to the Army by any department. Any State, Territory, or the District of Columbia may, with the approval of the Secretary of War, purchase for cash from the War Department, for

the use of its militia, stores, supplies, material of war, or military publications, such as are furnished to the Army, in addition to those issued under the provisions of this Act, at the price at which they are listed for issue to the Army, with the cost of transportation added, and funds received from such sales shall be credited to the appropriations to which they belong and shall not be covered into the Treasury, but shall be available until expended to replace therewith the supplies sold to the States and Territories and to the District of Columbia in the manner herein provided."

2618. Requisition of stores from States.—* * * *Provided*, That stores, supplies, and matériel of war so purchased by a State, Territory, or the District of Columbia may, in time of actual or threatened war, be requisitioned by the United States for use in the military service thereof, and when so requisitioned by the United States and delivered credit for the ultimate return of such property in kind shall be allowed to such State, Territory, or the District of Columbia. *Sec. 86, act of June 3, 1916 (39 Stat. 204).*

Notes of Decisions.

Payment for stores taken by Government.—The ordnance and other stores belonging to the several States, taken or accepted by the Government for use in the War with Spain, should not be returned in kind, but should be paid for at the price agreed upon, or, in the absence of an agreement, what they were worth. (1899) 22 Op. Atty. Gen. 372.

In the absence of any of the appropriation for the maintenance of the militia in

the several States, or of arms, ordnance stores, etc., purchased with it, the Government is not required or empowered to issue to the several States stores in kind to replace such arms, ordnance stores, etc., as were exhausted, consumed, or impaired by use in the War with Spain; nor can it make compensation for such stores, as they were the property of the United States, having been originally purchased by the Federal Government. *Id.*

2619. Credit for stores sold by the Government to the States.—* * * *Provided*, That hereafter whenever articles of government property are sold for cash to any State, Territory, or to the District of Columbia, for the use of the organized militia, thereby ceasing to be the property of the United States, none of the articles so sold shall be received back by any department of the Government upon the basis of allowing any credit therefor, except when such articles form part of the equipment of troops mustered into the service of the United States in time of war. *Sec. 3, act of June 23, 1910 (36 Stat. 603).*

2620. Procurement of animals.—Funds allotted by the Secretary of War for the support of the National Guard shall be available for the purchase, under such regulations as the Secretary of War may prescribe, of animals conforming to the Regular Army standards for the training of the National Guard, said animals to remain the property of the United States and to be used solely for military purposes. * * * *Sec. 89, act of June 3, 1916 (39 Stat. 205), as amended by sec. 45, act of June 4, 1920 (41 Stat. 783).*

2621. Issue of animals.—* * * The number of animals so issued shall not exceed thirty-two for each battery of field artillery or troop of cavalry, and a proportionate number of other mounted organizations, under such regulations as the Secretary of War may prescribe; and the Secretary of War is further authorized to issue, in lieu of purchase, for the training of such organizations, condemned Army animals which are no longer fit for service, but which may be suitable for the purposes of instruction, such animals to be sold as now provided by law when said purposes shall have been served. *Sec. 89, act of June 3, 1916 (39 Stat. 205), as amended by sec. 45, act of June 4, 1920 (41 Stat. 783).*

The act of Mar. 4, 1915 (38 Stat. 1071), provided that—

"The Secretary of War may, under the provisions of this Act and such regulations as he may prescribe, issue to the Field Artillery organizations hereinbefore mentioned and

without cost to the State condemned Army horses which are no longer fit for service but may still be suitable for purposes of instruction, the same to be sold as now provided by law when the latter purpose has been served."

2622. Care of animals and material.—Funds allotted by the Secretary of War for the support of the National Guard shall be available for the purchase and issue of forage, bedding, shoeing, and veterinary services, and supplies for the Government animals issued to any organization, and for the compensation of competent help for the care of the material, animals, and equipment thereof, under such regulations as the Secretary of War may prescribe: *Provided*, That the men to be compensated, not to exceed five for each organization, shall be duly enlisted therein and shall be detailed by the organization commander, under such regulations as the Secretary of War may prescribe, and shall be paid by the United States disbursing officer in each State, Territory, and the District of Columbia. *Sec. 90, act of June 3, 1916 (39 Stat. 205), as amended by sec. 46, act of June 4, 1920 (41 Stat. 783).*

2623. Arms, ammunition, and equipment for home guards.—That the Secretary of War during this existing emergency be, and he is hereby, authorized, in his discretion, to issue from time to time to the several States and Territories and the District of Columbia for the equipment of such home guards having the character of State police or constabulary as may be organized by the several States and Territories and District of Columbia, and such other home guards as may be organized under the direction of the governors of the several States and Territories and the Commissioners of the District of Columbia or other State troops or militia, such rifles and ammunition therefor, cartridge belts, haversacks, canteens, in limited amounts as available supplies will permit, provided that the property so issued shall remain the property of the United States and shall be receipted for by the governors of the several States and Territories and Commissioners of the District of Columbia and accounted for by them under such regulations and upon furnishing such bonds or security as the Secretary of War may prescribe, and that any property so issued shall be returned to the United States on demand when no longer needed for the purposes for which issued, or if, in the judgment of the Secretary of War, an exigency requires the use of the property for Federal purposes: * * * *Act of June 14, 1917 (40 Stat. 181).*

CHAPTER 39.

MILITARY TRAINING OF CIVILIANS.

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2624. Reserve Officers' Training Corps.—The President is hereby authorized to establish and maintain in civil educational institutions a Reserve Officers' Training Corps, one or more units in number, which shall consist of a senior division organized at universities and colleges granting degrees, including State universities and those State institutions that are required to provide instruction in military tactics under the Act of Congress of July 2, 1902, donating lands for the establishment of colleges where the leading object shall be practical instruction in agriculture and the mechanic arts, including military tactics, and at those essentially military schools not conferring academic degrees, specially designated by the Secretary of War as qualified, and a junior division organized at all other public and private educational institutions, and each division shall consist of units of the several arms, corps, or services in such number and such strength as the President may prescribe: *Provided*, That no such unit shall be established or maintained at any institution until an officer of the Regular Army shall have been detailed as professor of military science and tactics, nor until such institution shall maintain under military instruction at least one hundred physically fit male students, except that in the case of units other than infantry, cavalry or artillery, the minimum number shall be fifty: *Provided further*, That except at State institutions described in this section, no unit shall be established or maintained in an educational institution until the authorities of the same agree to establish and maintain a two years' elective or compulsory course of military training as a minimum for its physically fit male students, which course, when entered upon by any student, shall, as regards such student, be a prerequisite for graduation unless he is relieved of this obligation by regulations to be prescribed by the Secretary of War. *Sec. 40, act of June 3, 1916 (39 Stat. 191), as amended by sec. 33, act of June 4, 1920 (41 Stat. 776-777).*

The above topic was treated also by secs. 41 and 42, act of June 3, 1916. (39 Stat. 191), which were stricken out by sec. 33, act of June 4, 1920, above cited.

2625. First Corps Cadets, National Guard of Massachusetts.— * * * *Provided*, That the Secretary of War, in his discretion, is authorized to designate the First Corps Cadets of the National Guard of Massachusetts as a unit of

the Senior Division of the Reserve Officers' Training Corps: *Provided further*, That the First Corps Cadets shall be subject to such rules and regulations as may be prescribed under the provisions of the National Defense Act of June third, nineteen hundred and sixteen, or amendments thereto, relating to the Reserve Officers' Training Corps: *Provided further*, That the drill and instruction, including indoor target practice, required of the First Corps Cadets as a National Guard organization is hereby waived: *And provided further*, That the privileges and benefits extended by existing laws to National Guard organizations, including those organizations provided for in section sixty-three of the National Defense Act of June third, nineteen hundred and sixteen, be continued in full force and effect. *Act of May 12, 1917 (40 Stat. 71).*

2626. Qualifications of members of the Reserve Officers' Training Corps.—Eligibility to membership in the Reserve Officers' Training Corps shall be limited to students of institutions in which units of such corps may be established who are citizens of the United States, who are not less than fourteen years of age, and whose bodily condition indicates that they are physically fit to perform military duty, or will be so upon arrival at military age. *Sec. 44, act of June 3, 1916 (39 Stat. 192).*

* * * *Provided further*, That any reserve officer who is also a medical, dental, or veterinary student may be admitted to such Medical, Dental, or Veterinary Corps unit for such training, under such rules and regulations as the Secretary of War may prescribe: * * * *Sec. 47c, added to the act of June 3, 1916, by sec. 34, act of June 4, 1920 (41 Stat. 779).*

2627. Commutation of subsistence for senior members of the Reserve Officers' Training Corps.—When any member of the senior division of the Reserve Officers' Training Corps has completed two academic years of service in that division, and has been selected for advanced training by the president of the institution and by the professor of military science and tactics, and has agreed in writing to continue in the Reserve Officers' Training Corps for the remainder of his course at the institution, devoting five hours per week to the military training prescribed by the Secretary of War, and has agreed in writing to pursue the course in camp training prescribed by the Secretary of War, he may be furnished at the expense of the United States commutation of subsistence at such rate, not exceeding the cost of the garrison ration prescribed for the Army, as may be fixed by the Secretary of War, during the remainder of his service in the Reserve Officers' Training Corps, not exceeding two years: *Provided*, That any medical, dental, or veterinary student may be admitted to a Medical, Dental, or Veterinary Corps unit of the Reserve Officers' Training Corps for a course of training at the rate of ninety hours of instruction per annum for the four collegiate years, and if at the end of two years of such training he has been selected by the professor of military science and tactics and the head of the institution for advanced training, and has agreed in writing to continue in the Reserve Officers' Training Corps for the remainder of his course at the institution, and has agreed in writing to pursue the course in camp training prescribed by the Secretary of War, he may be furnished, at the expense of the United States, with commutation of subsistence at such rate not exceeding the cost of the garrison ration prescribed for the Army, as may be fixed by the Secretary of War, during the remainder of his service in the Reserve Officers' Training Corps, not exceeding two years: * * * *Sec. 47c, added to the act of June 3, 1916, by sec. 34, act of June 4, 1920 (41 Stat. 778-779): Quartermaster supplies and so forth, Reserve Officers' Training Corps.*

* * * for the payment of commutation of subsistence to members of the senior division of the Reserve Officers' Training Corps, at such rate, not exceeding the cost of the garrison ration prescribed for the Army, as authorized in the Act of Congress approved June 3, 1916, * * *. *Act of June 5, 1920 (41 Stat. 966), making appropriations for the support of the Army.*

The above topic was treated by sec. 50, act of June 3, 1916 (39 Stat. 193), which has been stricken out by sec. 84, act of June 4, 1920, above cited.

2628. Credit for military training received at different institutions by a member of the Reserve Officers' Training Corps.—That in the interpretation and execution of section fifty of the Act of Congress approved June third, nineteen hundred and sixteen, credit shall be given as for service in the senior division of the Reserve Officers' Training Corps to any member of that division for any period or periods of time during which such member has received or shall have received at an educational institution under the direction of an officer of the Army, detailed as professor of military science and tactics, a course of military training substantially equivalent to that prescribed by regulations under this section for the corresponding period or periods of training of the senior division, Reserve Officers' Training Corps. *Joint Resolution of Sept. 8, 1916 (39 Stat. 853).*

2629. Pay of Reserve Officers' Training Corps.— * * * *Provided further,* That members of the Reserve Officers' Training Corps, or other persons authorized by the Secretary of War to attend advanced course camps, shall be paid for attendance at such camps at the rate prescribed for soldiers of the seventh grade of the Regular Army. *Sec. 47c, added to the act of June 3, 1916, by sec. 34, act of June 4, 1920 (41 Stat. 779).*

2630. Courses of training for Reserve Officers' Training Corps.—The Secretary of War is hereby authorized to prescribe standard courses of theoretical and practical military training for units of the Reserve Officers' Training Corps, and no unit of such corps shall be organized or maintained at any educational institution the authorities of which fail or neglect to adopt into their curriculum the prescribed courses of military training or to devote at least an average of three hours per week per academic year to such military training, except as provided in section 47c of this Act. *Sec. 40a, added to the act of June 3, 1916, by sec. 33, act of June 4, 1920 (41 Stat. 777).*

The above topic was treated by sec. 43, act of June 3, 1916 (39 Stat. 192), which was stricken out by sec. 33, act of June 4, 1920, above cited.

2631. Training camps for the Reserve Officers' Training Corps.—The Secretary of War is hereby authorized to maintain camps for the further practical instruction of the members of the Reserve Officers' Training Corps, no such camps to be maintained for a longer period than six weeks in any one year, except in time of actual or threatened hostilities; * * * to use the troops of the Regular Army, and such Government property as he may deem necessary, for the military training of the members of such corps while in attendance at such camps; and to prescribe regulations for the government of such camps. *Sec. 47a, added to the act of June 3, 1916, by sec. 34, act of June 4, 1920 (41 Stat. 778).*

The above topic was treated by sec. 48, act of June 3, 1916, (39 Stat. 193), which has been stricken out by sec. 34, act of June 4, 1920, above cited.

Appropriation for the maintenance of the above camps is regularly made in the support of the Army acts.

2632. Traveling expenses of Reserve Officers' Training Corps.—The Secretary of War is hereby authorized * * * to transport members of such corps to and from such camps at the expense of the United States so far as appropriations will permit, to subsist them at the expense of the United States while traveling to and from such camps and while remaining therein so far as appropriations will permit, or in lieu of transporting them to and from such camps and subsisting them while en route, to pay them travel allowances at the rate of 5 cents per mile for the distance by the shortest usually traveled route from the places from which they are authorized to proceed to the camp and for the return travel thereto, and to make the payment of travel allowances for the return journey in advance of the actual performance of the same. * * * *Sec. 47a, added to the act of June 3, 1916, by sec. 34, act of June 4, 1920 (41 Stat. 778).*

* * * and for transporting members of such corps to and from such camps, and to subsist them while traveling to and from such camps and while remaining therein so far as appropriations will permit: * * * *Provided*, That so much of section 48 of the Act of June 3, 1916, entitled "An Act for making further and more effectual provisions for the national defense, and for other purposes," as relates to the transportation of members of the Reserve Officers' Training Corps attending summer camps be, and the same is hereby amended so as to provide that such members of the Reserve Officers' Training Corps shall be paid as traveling allowances 5 cents per mile for the distance by the shortest usually traveled route from the places from which they are authorized to proceed to the camp and for the return travel thereto: *Provided further*, That the payment of travel pay for the return journey may be made in advance of the actual performance of travel. * * * *Act of June 5, 1920 (41 Stat. 966-967), making appropriations for the support of the Army: Quartermaster supplies and so forth, Reserve Officers' Training Corps.*

The above topic was treated by sec. 48, act of June 3, 1916 (39 Stat. 193), which was stricken out by sec. 34, act of June 4, 1920, above cited.

2633. Training camps for civilians and soldiers.—The Secretary of War is hereby authorized to maintain, upon military reservations or elsewhere, schools or camps for the military instruction and training, with a view to their appointment as reserve officers or noncommissioned officers, of such warrant officers, enlisted men, and civilians as may be selected upon their own application; to use for the purpose of maintaining said camps and imparting military instruction and training thereat, such arms, ammunition, accoutrements, equipments, tentage, field equipage, and transportation belonging to the United States as he may deem necessary; to furnish at the expense of the United States uniforms, subsistence * * * and medical attendance and supplies to persons receiving instruction at said camps during the period of their attendance thereat, to authorize such expenditures, from proper Army appropriations, as he may deem necessary for water, fuel, light, temporary structures, not including quarters for officers nor barracks for men, screening, and damages resulting from field exercises, and other expenses incidental to the maintenance of said camps, and the theoretical winter instruction in connection therewith; and to sell to persons receiving instructions at said camps, for cash and at cost price, plus 10 per centum, quartermaster and ordnance property, the amount of such property sold to any one person to be limited to that which is required for his proper equipment. All moneys arising from such sales shall remain available throughout the fiscal year following that in which the sales are made, for the

purpose of that appropriation from which the property sold was authorized to be supplied at the time for the sale. * * * *Sec. 47d, added to the act of June 3, 1916, by sec. 34, act of June 4, 1920 (41 Stat. 779).*

For the expense of maintaining upon military reservations, camps for military instruction and training of such citizens as may be selected and under such regulations as may be prescribed by the Secretary of War pursuant to section 54 of the Act of June 3, 1916, as amended by the Act of May 12, 1917, and for furnishing said citizens at the expense of the United States, uniforms, subsistence, and transportation by the most usual and direct routes within such limits as to territory as may be prescribed; for such expenditures as are authorized by said section and may be necessary for the establishment and maintenance of said camps; for furnishing such equipment, tentage, field equipage, and transportation belonging to the United States as may be necessary; for arms and ordnance equipment, including overhauling and repairing of personal equipment, machine-gun outfits, horse equipment, ammunition, targets and their accessories for target practice, and for overhauling and repairing arms for issue and use in connection with said camps, \$250,000: *Provided, That the funds herein appropriated shall not be used for the training of any person who is over forty-five years of age. Act of June 5, 1920 (41 Stat. 974), making appropriations for the support of the Army: Civilian military training camps.*

The above topic was treated by sec. 54, act of June 3, 1916 (39 Stat. 194), which was stricken out by sec. 34, act of June 4, 1920, above cited.

2634. Courses of instruction and instructors at training camps.— * * * The Secretary of War is authorized further to prescribe the courses of theoretical and practical instruction to be pursued by persons attending the camps authorized by this section; to fix the periods during which such camps shall be maintained; to prescribe rules and regulations for the government thereof; and to employ thereat officers, warrant officers, and enlisted men of the Regular Army in such numbers and upon such duties as he may designate. *Sec. 47d, added to the act of June 3, 1916, by sec. 34, act of June 4, 1920 (41 Stat. 779-780).*

The above topic was treated by sec. 54, act of June 3, 1916 (39 Stat. 195), which was stricken out by sec. 34, act of June 4, 1920, above cited.

2635. Traveling expenses to and from training camps.— * * * to furnish at the expense of the United States * * * transportation by the most usual and direct route within such limits as to territory as the Secretary of War may prescribe, or in lieu of furnishing such transportation and subsistence to pay them travel allowances at the rate of 5 cents per mile for the distance by the shortest usually traveled route from the places from which they are authorized to proceed to the camp, and for the return travel thereto, and to make the payment of travel allowances for the return journey in advance of the actual performance of the same * * * *Sec. 47d, added to the act of June 3, 1916, by sec. 34, act of June 4, 1920 (41 Stat. 779).*

The above topic was treated by sec. 54, act of June 3, 1916 (39 Stat. 194), which was stricken out by sec. 34, act of June 4, 1920, above cited.

2636. Federal support of rifle practice.—To establish and maintain indoor and outdoor rifle ranges for the use of all able-bodied males capable of bearing arms, under reasonable regulations to be prescribed by the National Board for the Promotion of Rifle Practice and approved by the Secretary of War; for the employment of labor in connection with the establishment of outdoor

and indoor rifle ranges, including labor in operating targets; for the employment of instructors; for clerical services; for badges and other insignia; for the transportation of employees, instructors, and civilians to engage in practice; for the purchase of materials, supplies, and services, and for expenses incidental to instruction of citizens of the United States in marksmanship, and their participation in national and international matches, to be expended under the direction of the Secretary of War, and to remain available until expended, \$100,000: *Act of June 5, 1920 (41 Stat. 966), making appropriations for the support of the Army: Quartermaster supplies and services for rifle ranges for civilian instruction.*

For arms, ammunition, targets, and other accessories for target practice for issue in accordance with rules and regulations prescribed by the National Board for the Promotion of Rifle Practice and approved by the Secretary of War, in connection with the encouragement of rifle practice, in pursuance of the provisions of law, \$100. *Act of June 5, 1920 (41 Stat. 974), making appropriations for the support of the Army: Ordnance equipment for rifle ranges for civilian instruction.*

* * * and for the promotion of rifle practice throughout the United States, including the reimbursement of necessary expenses of members of the National Board for the Promotion of Rifle Practice, to be expended for the purposes hereinbefore prescribed, under the direction of the Secretary of War, * * *. *Act of June 5, 1920 (41 Stat. 971), making appropriations for the support of the Army: National trophy. * * **

2637. Transportation of teams to participate in national matches.— * * * *Provided*, That out of the said sum of \$100,000 there may be expended for the payment of transportation, for supplying meals, or furnishing commutation of subsistence of civilian rifle teams authorized by the Secretary of War to participate in the national matches, not to exceed \$80,000: *Provided further*, That hereafter members of civilian rifle teams may, in the discretion of the Secretary of War, be paid, as commutation of traveling expenses at the rate of 5 cents per mile for the shortest usually traveled route from their homes to national matches, when authorized to participate therein by the Secretary of War and for the return travel thereto: *Provided further*, That the payment of travel pay for the return journey may be made in advance of the actual performance of travel. *Act of June 5, 1920 (41 Stat. 966), making appropriations for the support of the Army: Quartermaster supplies and services for rifle ranges for civilian instruction.*

CHAPTER 40.

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HISTORICAL NOTE.

The Military Academy was established in pursuance of authority conferred by the act of Mar. 16, 1802 (2 Stat. 137), which contained a requirement authorizing the President to establish a corps of engineers: "The said corps, when so organized, shall be stationed at West Point, in the State of New York, and shall constitute a military academy." Secs. 26 and 27, act of Mar. 16, 1802 (2 Stat. 137).

The post of West Point ceased to be an Engineer station and the control of the Military Academy was transferred from the Chief of Engineers to such officer or officers as the Secretary of War may assign to that duty by the act of July 13, 1806 (14 Stat. 92).

By Public Resolution No. 35, act of July 2, 1918 (40 Stat. 755), and No. 4, act of July 9, 1919 (41 Stat. 234), and act of Mar. 30, 1920 (41 Stat. 548), provisions were made for permitting certain aliens to receive instructions at the United States Military Academy without expense to the United States.

2638. Supervision.—The supervision and charge of the Academy shall be in the War Department, under such officer or officers as the Secretary of War may assign to that duty. *R. S. 1331.*

Notes of Decisions.

Regulations.—The regulations of the Military Academy may be altered by the Secretary of War, with the approbation of the President. (1821) 1 Op. Atty. Gen. 469.

Disposition of property.—This section has a special and partial purpose and gives no authority to dispose of the use of property. (1897) 21 Op. Atty. Gen. 537.

2639. Officers, professors and instructors.—The United States Military Academy at West Point, in the State of New York, shall be constituted as follows: There shall be one superintendent; one commandant of cadets; one senior instructor in the tactics of artillery; one senior instructor in the tactics of cavalry; one senior instructor in the tactics of infantry; one professor and one assistant professor of civil and military engineering; one professor and one assistant professor of natural and experimental philosophy; one professor and one assistant professor of mathematics; one chaplain, who shall also be professor of history, geography, and ethics, and one assistant professor of the same; one professor and one assistant professor of chemistry, mineralogy, and geology; one professor and one assistant professor of drawing; one professor and one assistant professor of the French language; one professor and one assistant professor of the Spanish language; one adjutant; one master of the sword; and one teacher of music. *R. S. 1309.*

The portion of this section providing for "one chaplain, who shall also be professor of history, geography, and ethics, and one assistant professor of the same," was expressly repealed by act of Feb. 18, 1896, the provisions of which relating to the appointment, pay, etc., of a chaplain, are set forth 2677, post.

The words of this section authorizing a professor of the French language and a professor of the Spanish language, were superseded by 2667, post.

2640. Selection of officers.—The superintendent and commandant of cadets may be selected, and all other officers on duty at the Academy may be detailed, from any arm of the service; * * * *R. S. 1314.*

2641. Graduates as professors or instructors.—* * * and hereafter no graduate of the Military Academy shall be assigned or detailed to serve at said Academy as a professor, instructor, or assistant to either within two years after his graduation, and so much of the act of June thirtieth, eighteen hundred and eighty-two, as requires a longer service than two years for said assignments or details is hereby repealed. *Act of July 26, 1894 (28 Stat. 151).*

Act June 30, 1882 (22 Stat. 123), referred to and repealed in part in this provision, provided that four years must elapse before any graduate should be assigned or detailed as professor, etc.

2642. Appointment and detail of officers.—The superintendent, the commandant of cadets, and the professors shall be appointed by the President. The assistant professors, acting assistant professors, and the adjutant shall be officers of the Army, detailed and assigned to such duties by the Secretary of War, or cadets assigned by the superintendent, under the direction of the Secretary of War. *R. S. 1313.*

2643. Vacancies in the permanent establishment.— * * * *Provided*, That the President of the United States be authorized to fill any vacancies occurring at said academy by reason of death, or other cause, of any person appointed by him. *Act of Mar. 3, 1875 (18 Stat. 467).*

2644. Command of the Academy.—The superintendent, and, in his absence, the next in rank, shall have the immediate government and military command of the Academy, and shall be commandant of the military post of West Point. *R. S. 1311.*

Notes of Decisions.

Residents and visitors at the academy.—No person can be entitled, as a matter of right, to enter within the limits of this post unless he be authorized to do so by the laws of the United States, or by some officer having authority under the law to grant permission to enter such limits. The superintendent of the academy, as commandant of this post, has a general authority to prevent any person in civil life residing permanently or temporarily at the post, or occasionally resorting to the post, from interrupting its discipline, or obstructing in any way the performance of the duties assigned by law to the officers and cadets. In the exercise of a sound discretion, the commandant of the post may therefore order from it any person not attached to it by law whose presence is, in his judgment, injurious to the interests of

the academy. And in case any person so ordered shall refuse to depart, after reasonable notice and within a reasonable time, having regard to the circumstances of the case, the superintendent may lawfully remove him by force. (1837) 3 Op. Atty. Gen. 268.

When, however, the United States has leased a dwelling house within the post belonging to it to an individual, it has no greater right than an individual would have in respect to the ejectment of the lessee. *Id.*

No person has the right to enter the limits of the post of West Point, not even to visit the post office there, unless specially authorized by the laws of the United States or by some officer having authority to grant permission. *Id.*

2645. Rank of the superintendent and the commandant of cadets.—The superintendent and the commandant of cadets, while serving as such, shall have, respectively, the local rank of colonel and lieutenant-colonel of engineers. *R. S. 1310.*

The office of superintendent was created by sec. 28 of the act of Mar. 16, 1802 (2 Stat. 137), which contained the requirement that "the principal engineer and, in his absence, the next in rank, shall have the superintendence of the Military Academy under the direction of the President of the United States." So much of the act of Mar. 16, 1802, as restricted the appointment to this office to the Corps of Engineers was replaced by sec. 6 of the act of July 16, 1860 (14 Stat. 92), which vested the supervision of the academy in the War Department, under such officer or officers as the Secretary of War may assign to that duty. By the act of Jan. 12, 1858 (11 Stat. 333), the local rank of colonel of Engineers was conferred upon the superintendent.

The act of June 20, 1840 (5 Stat. 393), contained the requirement that the commander of the corps of cadets should be either the instructor of infantry tactics, of Cavalry or Artillery tactics, or of practical engineering; and his pay and emoluments were in no case to be less than those allowed by law to the professor of mathematics. By the act of June 12, 1858 (11 Stat. 333), the pay of this officer was fixed at that of a lieutenant colonel.

Notes of Decisions.

Superintendent.—Prior to the enactment of *R. S. 1314*, ante, 2640, the superintendent of the academy could be selected only from the Engineer Corps. That section

permitted a selection from any arm of the service, and did not confine the selection to an officer whose rank in the arm from which he was selected was that of colonel.

Hence an officer holding the rank of major general might be selected as superintendent. (1876) 15 Op. Atty. Gen. 110.

2646. Pay of the superintendent and of the commandant of cadets.—The superintendent of the Military Academy shall have the pay of a colonel, and the commandant of cadets shall have the pay of a lieutenant-colonel. *R. S. 1334.*

See notes to 2645, ante.

2647. Leave of absence for the superintendent.—Hereafter the Secretary of War may grant the superintendent of the academy leave of absence without deduction from pay or allowances for the same period that the superintendent may grant leave of absence to other officers of the academy under the provisions of section thirteen hundred and thirty of the Revised Statutes. *Act of Aug. 9, 1912 (37 Stat. 263).*

For *R. S. 1330*, see post, 2654.

2648. Commandant of cadets.—The commandant of the cadets shall have the immediate command of the battalion of cadets, and shall be instructor in the tactics of artillery, cavalry, and infantry. *R. S. 1312.*

For statutes fixing rank and pay of the above officer, see 2645, 2646, ante, and 2658, post. See also note to 2692, post.

2649. Adjutant.—The adjutant of the Military Academy shall have the pay of an adjutant of a cavalry regiment. *R. S. 1335.*

For extra pay, see post, 2658.

2650. Quartermaster and commissary of cadets.—That the Secretary of War be hereby directed to detail a competent officer to act as quartermaster and commissary for the battalion of cadets, by whom all purchases and issues of supplies of all kinds for the cadets, and all provisions for the mess, shall be made, and that all supplies of all kinds and description shall be furnished to the cadets at actual cost, without any commission or advance over said cost; and such officer so assigned shall perform all the duties of purveying and supervision for the mess, as now done by the purveyor, without other compensation. *Act of Aug. 7, 1876 (19 Stat. 126).*

For extra pay, see post, 2658.

2651. Commissary sergeant.—* * * And the Secretary of War is hereby authorized to detail a commissary-sergeant to act as assistant to the commissary of cadets. *Act of June 30, 1882 (22 Stat. 123).*

2652. Command by the academic staff.—* * * but the academic staff as such shall not be entitled to any command in the Army separate from the Academy. *R. S. 1314.*

2653. Rank and command of professors.—*Provided*, That the professors and the associate professor of the United States Military Academy shall have the actual rank in the United States Army now assigned to them by assimilation in the regulations of the Military Academy prescribed by the President of the United States, and that they shall exercise command only in the academic department of the United States Military Academy. *Act of June 28, 1902 (32 Stat. 409).*

Notes of Decisions.

Nature of professor's office.—The office of | military acceptance of that term. This professor is not an Army office within the | section was designed to give rank to civilian

professors to enforce military discipline at the academy, but does not change the character of the office by the addition of actual

rank in the Army. *Huse v. U. S.* (1907), 43 Ct. Cl. 19.

2654. Leave of absence for professors and officers.—Leave of absence may be granted by the superintendent, under regulations prescribed by the Secretary of War, to the professors, assistant professors, instructors, and other officers of the Academy, for the entire period of the suspension of the ordinary academic studies, without deduction from pay or allowances. *R. S. 1330.*

Leave of absence to the superintendent was authorized by a provision of act of Aug. 9, 1912, ante, 2647.

The provisions of this section were extended to include officers on duty exclusively as instructors at the service schools by a provision of act of Mar. 23, 1910 (36 Stat. 244), ante, 1661.

2655. Retirement of professors.—The professors of the Military Academy at West Point are placed on the same footing, as to retirement from active service, as officers of the Army. *R. S. 1333.*

2656. Pay and allowances of professors and instructors.—Each of the professors of the Military Academy whose service at the Academy exceeds ten years shall have the pay and allowances of colonel, and all other professors shall have the pay and allowances of lieutenant-colonels; and the instructors of ordnance and science of gunnery and of practical engineering shall have the pay and allowances of major; and hereafter there shall be allowed and paid to the said professors ten per centum of their current yearly pay for each and every term of five years' service in the Army and at the Academy: *Provided*, That such addition shall in no case exceed forty per centum of said yearly pay; and said professors are hereby placed upon the same footing, as regards restrictions upon pay and retirement from active service, as officers of the Army. *R. S. 1336.*

* * * and that section thirteen hundred and thirty-six of the Revised Statutes be, and is hereby, amended by inserting, after the word "service" in the first line, the words "as professor." *Sec. 4, act of June 23, 1879 (21 Stat. 34), amending R. S. 1336.*

For pay of seven professors, \$26,500. *Act of Mar. 30, 1920 (41 Stat. 538).*

For additional pay see 2658, post.

2657. Rank and pay of colonel after long service for permanent professors.—That any officer of the United States Army now holding the position of permanent professor at the United States Military Academy who on July first, nineteen hundred and sixteen, should have served not less than thirty-three years in the Army, one-third of which service shall have been as professor and instructor at the Military Academy, shall on that date have the rank, pay, and allowances of a colonel in the Army: * * * *Act of Aug. 11, 1916 (39 Stat. 493).*

This section may be regarded as superseding a similar provision of act of Aug. 9, 1912 (37 Stat. 264), which applied to officers who, on July 1, 1914, had served not less than 33 years, etc.

2658. Extra pay of detached officers.—For extra pay of officers of the Army on detached service at the Military Academy:

For pay of one commandant of cadets (colonel) in addition to his regular pay, \$1,000.

For pay of one professor of ordnance and science of gunnery (lieutenant colonel) in addition to pay as major, \$500.

For pay of one professor of law (lieutenant colonel) in addition to pay as major, \$500.

For pay of one professor of practical military engineering (lieutenant colonel) in addition to pay as major, \$500.

For pay of twelve assistant professors (captains) in addition to pay as first and second lieutenants, \$4,800.

For pay of three battalion commanders in addition to pay as captain, \$1,800.

For pay of one senior assistant instructor of Field Artillery tactics (major) in addition to pay as captain, \$600.

For pay of one senior assistant instructor of Cavalry tactics (major) in addition to pay as captain, \$600.

For pay of one senior assistant instructor of Coast Artillery tactics (major) in addition to pay as captain, \$600.

For pay of sixteen instructors of Cavalry, Artillery (Field and Coast), and Infantry tactics (captains), in addition to pay as first and second lieutenants, \$6,400.

For pay of one adjutant, in addition to his regular pay, \$600.

For pay of one quartermaster and commissary of cadets and treasurer, in addition to his regular pay, \$600.

For pay of one line officer on duty in quartermaster's department at academy, in addition to his regular pay, \$400.

For pay of one associate professor of mathematics (major), in addition to pay as captain, \$600.

For pay of one constructing quartermaster, in addition to his regular pay, \$1,000.

For additional pay of professors and officers (and officers on increased rank) for length of service, \$12,000. *Act of Mar. 30, 1920 (41 Stat. 533-539).*

Similar provisions appear in previous appropriation acts.

2659. Quarters for civilian instructors.—* * * *Provided*, That these civilian instructors employed in the department of modern languages and the department of tactics shall be entitled to public quarters and to the same allowances with respect to fuel and light as those of a first lieutenant when occupying public quarters. *Act of Mar. 30, 1920 (41 Stat. 542).*

* * * *Provided*, That hereafter the chapel organist and choirmaster shall be entitled to public quarters when available and to the same allowances with respect to fuel and light as those of a second lieutenant when occupying public quarters; * * * *Act of Aug. 11, 1916 (39 Stat. 497).*

2660. Assistant professors and instructors of tactics.—Each assistant professor and each senior assistant instructor of cavalry, artillery, and infantry tactics * * * shall receive the pay of a captain. *R. S. 1337.*

Section thirteen hundred and thirty seven is amended by striking out, in the second line after the word "tactics" the words "and the instructors of practical military engineering." *Act of Feb. 27, 1877 (19 Stat. 244), amending R. S. 1337.*

That the assistant instructors of tactics commanding cadet companies at West Point shall receive the same pay and allowances as assistant professors in the other branches of study. *Act of Mar. 3, 1875 (18 Stat. 467).*

See ante, 2658, for extra pay.

Sec. 2 of the act of July 20, 1840 (5 Stat. 398), contained the requirement that the pay and emoluments of instructors in Cavalry, Artillery, and Infantry tactics should not be less than was allowed by law (captain mounted) to the assistant professor of

mathematics. This statute was replaced by the act of June 12, 1858 (11 Stat. 333), which conferred the pay of captain mounted upon the senior assistant instructor in each of the arms of service.

2661. Professor of ordnance and gunnery.—For pay of one professor of ordnance and science of gunnery (lieutenant-colonel), in addition to pay as major: *Provided*, That the position shall be filled by the detail of an officer of the Army, who, while so serving, shall have the title and status of other professors: * * * *Act of Mar. 2, 1907 (34 Stat. 1063)*; *making appropriations for the support of the Military Academy.*

See also 2658, ante.

2662. Assistant professors of ordnance and gunnery.—For pay of nine assistant professors (captains), two of whom are hereby authorized hereafter for the department of English and history and the department of ordnance and gunnery, one for each department, respectively, in addition to pay as first lieutenant, three thousand six hundred dollars; *Act of Mar. 3, 1911 (36 Stat. 1016)*.

See also 2658, ante.

2663. Associate professor of mathematics.—* * * and there shall be appointed at the Military Academy from the Army, in addition to the professors authorized by the existing laws, an associate professor of mathematics, * * * *Act of Mar. 1, 1893 (27 Stat. 515)*.

Provided, That hereafter the associate professor of mathematics shall have pay and allowances of a major, and the position shall be filled by the detail of an officer from the Army at large; *Act of Mar. 3, 1905 (33 Stat. 850)*.

For extra pay, see ante, 2658.

2664. Professor of law.—* * * *Provided*, That the Secretary of War may assign one of the judge-advocates of the Army to be professor of law. *Act of June 6, 1874 (18 Stat. 60)*.

* * * *Provided*, That the Secretary of War may, in his discretion, assign any officer of the Army as professor of law. *Act of June 1, 1880 (21 Stat. 153)*.

2665. Assistant professor of law.—* * * and hereafter there may be assigned to the department of law one assistant professor. *Act of Jan. 16, 1895 (28 Stat. 630)*.

2666. Professor of military hygiene.—Hereafter any officer detailed from the Medical Corps of the Army as senior medical officer of the post at the Military Academy, whose rank shall not be below that of lieutenant-colonel, shall be the professor of military hygiene. *Act of Apr. 19, 1910 (36 Stat. 312)*.

A previous provision of act of June 28, 1906 (34 Stat. 822), authorized the detail of an officer of the Medical Corps as professor of military hygiene.

2667. Professor of modern languages.—That when a vacancy occurs in the office of professor of the French language or in the office of professor of the Spanish language in the Military Academy, both these officers shall cease, and the remaining one of the two professors shall be professor of modern languages; and thereafter there shall be in the Military Academy one, and only one, professor of modern languages; * * * *Sec. 4, act of June 23, 1879 (21 Stat. 34)*.

Notes of Decisions.

Professor of Spanish.—Held, that the professorship of the Spanish language in the Military Academy at West Point, estab-

lished by this section, could not be abolished by an Executive order. (1873) 16 Op. Atty. Gen. 17.

2668. Associate professor of modern languages.—* * * *Provided, That the Secretary of War shall assign an officer of the Army to the Military Academy as associate professor of modern languages, and that such officer, while so serving, shall receive the pay and allowances of a major; Act of Mar. 3, 1903 (32 Stat. 1012).*

2669. Civilian instructors in French.—For pay of two civilian instructors of French, to be employed under the rules prescribed by the Secretary of War, at \$2,000 each, \$4,000. *Act of Mar. 30, 1920 (41 Stat. 542).*

2670. Civilian instructors of Spanish.—For pay of two civilian instructors of Spanish, to be employed under the rules prescribed by the Secretary of War, at \$2,000 each, \$4,000. *Act of Mar. 30, 1920 (41 Stat. 542).*

2671. Professor of English and history.—* * * *Provided, That the head of the department of English and history shall hereafter have the same status as the professors at the head of the other departments of instruction at the Military Academy, and the President of the United States is hereby authorized, by and with the consent of the Senate, to appoint a civilian in the department of English and history, United States Military Academy, a professor at the Military Academy, with the rank, pay, allowances, title, and status of the other professors: Provided further, That the provisions of law relating to retirement for disability in line of duty shall not apply in the case of this professor until after he shall have served fifteen years at the Military Academy. Act of Apr. 15, 1910 (36 Stat. 312).*

The similar act for the preceding year, act of Mar. 4, 1909 (35 Stat. 1032), made an appropriation for pay of one instructor of English and history, to be selected and appointed from civil life by the Secretary of War.

2672. Assistant professors of English and history.—* * * *Provided, That hereafter two assistant professors shall be authorized in the department of English and history, one for English and one for history; Act of Aug. 9, 1912 (37 Stat. 252).*

2673. Master of the sword.—The master of the sword shall hereafter act as instructor of military gymnastics and physical culture at the Military Academy, and shall have the relative rank and shall be entitled to the pay, allowances, and emoluments of a first lieutenant, mounted: *Provided, however, That whenever a vacancy shall occur in the office of master of the sword and instructor of military gymnastics and physical culture the said office shall cease and determine, and the duties thereunto pertaining shall thereafter be performed by an officer of the line of the Army to be selected for that purpose by the Secretary of War; R. S. 1338, as amended by act of Mar. 2, 1901 (31 Stat. 914).*

For pay of master of the sword, \$3,500 and the present incumbent shall have the relative rank and be entitled to the pay, allowances, and emoluments of a lieutenant colonel during his incumbency. *Act of Mar. 30, 1920 (41 Stat. 538).*

This section, as enacted in the Revised Statutes, provided that the master of the sword was to receive pay at the rate of \$1,500 a year, with fuel and quarters.

The words of the section, "first lieutenant," were superseded by a provision that the master of the sword should have the relative rank and should be entitled to the pay, allowances, and emoluments of a captain mounted, made by act of Mar. 3, 1905 (33 Stat. 850).

By act of May 20, 1917 (40 Stat. 90), the incumbent was given the pay, allowances, and emoluments of a major during his active service.

2674. Civilian instructors in fencing, gymnastics and athletics.—For pay of two expert civilian instructors in fencing, broadsword exercises, and other military gymnastics as may be required to perfect this part of the training of cadets, \$3,000.

For pay of one professional civilian instructor in military gymnastics, fencing, boxing, wrestling, and swimming, \$1,500.

For pay of two expert assistant civilian instructors in military gymnastics, fencing, boxing, wrestling, and swimming, \$4,000: * * * *Act of Mar. 30, 1920 (41 Stat. 542).*

A similar provision was made in previous appropriation acts.

2675. Custodian of gymnasium.—For pay of one custodian of gymnasium, who shall hereafter be selected and appointed by the Superintendent of the Military Academy under Schedule A, classified positions excepted from examination under rule two, clause three, civil-service rules, who shall be qualified to act as trainer for the various cadet athletic teams, one thousand two hundred dollars. *Act of Mar. 3, 1911 (36 Stat. 1019).*

For pay of one custodian of gymnasium, \$1,200. *Act of March 30, 1920 (41 Stat. 543).*

2676. Teacher of music.—For pay of one teacher of music, \$2,000. *Act of March 30, 1920 (41 Stat. 542).*

Similar provisions appear in previous appropriation acts.

2677. Chaplain.— * * * *Provided*, That the duties of chaplain at the Military Academy shall hereafter be performed by a clergyman to be appointed by the President for a term of four years, and the said chaplain shall be eligible for re-appointment for an additional term or terms and shall, while so serving, receive the same pay and allowances as are now allowed to a captain mounted. *Act of Feb. 18, 1896 (29 Stat. 8).*

For pay of one chaplain, \$2,400. *Act of March 30, 1920 (41 Stat. 538).*

The first paragraph above repealed so much of R. S. 1309, as provided for a chaplain. See 2639, *ante*.

The office of chaplain was established by the act of Apr. 4, 1818 (3 Stat. 426), which authorized the appointment of a chaplain at the Military Academy, who should also be professor of geography, history, and ethics. By the act of Feb. 18, 1896 (29 Stat. 8), the professorship thus authorized was discontinued, the duties of chaplain being performed by the officer whose appointment was authorized by that statute, and the duty of giving instruction in history being transferred by Executive regulation to the department of law.

2678. Librarian and assistant librarian.—The librarian and assistant librarian at the Military Academy shall each receive one hundred and twenty dollars a year additional pay. *R. S. 1340.*

For pay of one librarian, \$3,000.

For pay of one assistant librarian, \$1,500. *Act of March 30, 1920 (41 Stat. 543).*

Similar provisions appear in previous appropriation acts.

2679. Composition of the Corps of Cadets.—That the Corps of Cadets of the United States Military Academy shall hereafter consist of two from each congressional district, two from each Territory, four from the District of Columbia, two from natives of Porto Rico, four from each State at large, and eighty-two from the United States at large, twenty of whom shall be selected from among the honor graduates of educational institutions having officers of the

Regular Army detailed as professors of military science and tactics under existing law or any law hereafter enacted for the detail of officers of the Regular Army to such institutions, and which institutions are designated as "honor schools," upon the determination of their relative standing at the last preceding annual inspection regularly made by the War Department, and two of whom shall be selected from persons recommended by the Vice President. They shall be appointed by the President and shall, with the exception of the eighty-two appointed from the United States at large, be actual residents of the congressional or territorial district, or of the District of Columbia, or of the Island of Porto Rico, or of the States, respectively, from which they purport to be appointed. *Chap. XXII, act of July 9, 1918 (40 Stat. 894).*

Sec. 1, act of Mar. 3, 1915, authorizing an increase in the number of cadets, has been superseded by the above statute. Sec. 3 of said act provided that the increase be made in four annual increments.

Notes of Decisions.

District of appointment.—In general, minors whose fathers are living and residing within the United States are, by reason of their minority, ineligible to appointment

as cadets to the Military Academy at West Point from any other congressional districts than those in which their fathers reside. (1869) 13 Op. Atty. Gen. 130.

2680. Appointment of enlisted men as cadets.—That the President is hereby authorized to appoint cadets to the United States Military Academy from among enlisted men in number as nearly equal as practicable of the Regular Army and the National Guard between the ages of nineteen and twenty-two years who have served as enlisted men not less than one year, to be selected under such regulations as the President may prescribe: *Provided*, That the total number so selected shall not exceed one hundred and eighty at any one time. *Sec. 2, act of May 4, 1916 (39 Stat. 62).*

2681. Appointment of Filipinos as cadets.—The Secretary of War is hereby authorized to permit not exceeding four Filipinos, to be designated, one for each class, by the Philippine Commission, to receive instruction at the United States Military Academy at West Point: *Provided*, That the Filipinos undergoing instruction, as herein authorized, shall receive the same pay, allowances, and emoluments as are authorized by law for cadets at the Military Academy appointed from the United States, to be paid out of the same appropriations: *And provided further*, That said Filipinos undergoing instruction on graduation shall be eligible only to commissions in the Philippine Scouts. And the provisions of section thirteen hundred and twenty-one, Revised Statutes, are modified in the case of the Filipinos undergoing instruction, so as to require them to engage to serve for eight years, unless sooner discharged, in the Philippine Scouts. *Act of May 28, 1908 (35 Stat. 441).*

Provided, That the four Filipino cadets authorized by the Act of May twenty-eighth, nineteen hundred and eight, to be designated by the Philippine Commission to receive instructions at the United States Military Academy, shall hereafter be designated by the Governor General of the Philippine Islands. *Act of Aug. 11, 1916 (39 Stat. 493).*

For R. S. 1321, see 2680, post.

2682. Appointment of cadets in advance of admission.—Cadets shall be appointed one year in advance of the time of their admission to the Academy, except in cases where, by reason of death or other cause, a vacancy occurs which can not be provided for by such appointment in advance; but no pay

or other allowance shall be given to any appointee until he shall have been regularly admitted, as herein provided; and all appointments shall be conditional, until such provisions shall have been complied with. *R. S. 1317.*

2683. Admission of a cadet although predecessor has been retained.— * * * *Provided*, That any person heretofore nominated in accordance with regulations, for appointment to fill a vacancy which would have resulted from the graduation of a cadet during the present year, may be so appointed notwithstanding the retention of such cadet at the Academy: * * * *Act of Mar. 30, 1920 (41 Stat. 548).*

2684. Examinations for admission.—Appointees shall be examined under regulations to be framed by the Secretary of War before they shall be admitted to the Academy and shall be required to be well versed in such subjects as he may from time to time prescribe. *R. S. 1319, as amended by the act of Mar. 2, 1901 (31 Stat. 911).*

2685. Physical examination for admission.— * * * *Provided further*, That hereafter any candidate designated as principal or alternate for appointment as cadet may present himself at any time for physical examination at West Point, New York, or other prescribed places, as may be designated by the Secretary of War: * * * *Act of Aug. 9, 1912 (37 Stat. 252).*

2686. Age of cadets at admission.—Appointees shall be admitted to the Academy only between the ages of seventeen and twenty-two years, except in the following case: That during the calendar years 1918, 1920 and 1921 any appointee who has served honorably and faithfully not less than one year in the armed forces of the United States or allied armies in the late war with Germany, and who possesses the other qualifications required by law, may be admitted between the ages of seventeen and twenty-four years: *Provided*, That whenever any member of the graduating class shall fail to complete the course with his class by reason of sickness, or deficiency in his studies, or other cause, such failure shall not operate to delay the admission of his successor. *R. S. 1318, as amended by act of Mar. 30, 1920 (41 Stat. 548).*

R. S. 1318 provided that appointees should be admitted to the academy only between the ages of 17 and 22 years.

2687. Admission on the first of March.—*Provided*, That cadets appointed to the Military Academy at West Point, New York, for admission after the year nineteen hundred and seven, may be admitted on the first day of March in place of the first day of June. *Act of Mar. 2, 1907 (34 Stat. 1063).*

2688. Traveling expenses of cadets from their homes to the academy.—*Provided further*, That hereafter the actual and necessary traveling expenses of candidates while proceeding from their homes to the Military Academy for qualification as cadets shall, if admitted, be credited to their accounts and paid after admission from the appropriation for the transportation of the Army and its supplies. *Act of June 28, 1902 (32 Stat. 409).*

2689. Oath of cadets.—Each cadet shall, previous to his admission to the Academy, take and subscribe an oath or affirmation in the following form:

"I, A B, do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States, paramount to any and all allegiance, sovereignty, or fealty I may owe to any State, county, or country whatsoever; and that I will at all times obey the legal orders of my superior officers, and the rules and articles governing the armies of the United States."

And any cadet or candidate for admission who shall refuse to take this oath shall be dismissed from the service. *R. S. 1320.*

2690. Engagement for military service by cadets.—Each cadet shall sign articles, with the consent of his parents or guardian if he be a minor, and if any he have, by which he shall engage to serve eight years unless sooner discharged. *R. S. 1321.*

The provisions of this section were modified, in the case of Filipinos receiving instruction at the academy, by a provision of act of May 28, 1908, ante, 2681.

2691. Cadets liable to military service.—Cadets shall be subject at all times to do duty in such places and on such service as the President may direct. *R. S. 1323.*

Notes of Decisions.

Service.—Cadets are neither commissioned officers, nor common soldiers, nor noncommissioned officers, but are inferior officers, who, for purposes of instruction, may be required to serve as officers, noncommissioned officers, or privates. *Babbitt v. U. S. (1880), 16 Ct. Cl. 202.*

The cadet corps of the Military Academy is a part of the Army. *U. S. v. Morton (1884), 5 Sup. Ct. 1, 3, 112 U. S. 1, 28*

L. Ed. 613; Morton v. U. S. (1884), 19 Ct. Cl. 200. See also Hartigan v. U. S. (1905), 25 Sup. Ct. 204, 205, 196 U. S. 169, 49 L. Ed. 434, holding that a cadet may, in a certain sense, be an officer, as distinguished from an enlisted man, but that he is not an officer of the Army within the meaning of that word as used in other sections of this title. See notes to 2446, ante.

2692. Organization and training of the corps of cadets.—The corps of cadets shall be arranged into companies, according to the directions of the superintendent, each of which shall be commanded by an officer of the Army, for the purpose of military instruction. To each company shall be added four musicians. The corps shall be taught and trained in all the duties of a private soldier, non-commissioned officer, and officer, shall be encamped at least three months in each year, and shall be taught and trained in all the duties incident to a regular camp. *R. S. 1322.*

Recent Military Academy appropriation acts provide for three battalion commanders. The current appropriation act provides for 31 field musicians (41 Stat. 539). See 2658, ante.

2693. Four years of training for cadets.—The course of instruction at the United States Military Academy shall be four years: * * * *Act of March 30, 1920 (41 Stat. 548).*

The course of study at the Military Academy is fixed in part by the statutes creating the several departments of instruction, and in part by Executive regulation.

2694. Additional year at the Academy for cadets.—* * * *Provided further,* That any cadet now at the academy may at his option, exercised prior to June 11, 1920, continue at the academy one additional year and postpone thereby his prospective graduation, and cadets not electing so to prolong their course shall be graduated in the years assigned to their respective classes prior to the passage of this Act. *Act of March 30, 1920 (41 Stat. 548).*

2695. Instruction as to effect of alcohol and narcotics.—That the nature of alcoholic drinks and narcotics, and special instruction as to their effects upon the human system, in connection with the several divisions of the subject of physiology and hygiene, shall be included in the branches of study taught in the common or public schools and in the Military and Naval Schools, and shall be studied and taught as thoroughly and in the same manner as other like required

branches are in said schools, by the use of text-books in the hands of pupils where other branches are thus studied in said schools, and by all pupils in all said schools throughout the Territories, in the Military and Naval Academies of the United States, and in the District of Columbia, and in all Indian and colored schools in the Territories of the United States. *Sec. 1, act of May 20, 1886 (24 Stat. 69).*

That it shall be the duty of the proper officers in control of any school described in the foregoing section to enforce the provisions of this act; and any such officer, school director, committee, superintendent, or teacher who shall refuse or neglect to comply with the requirements of this act, or shall neglect or fail to make proper provisions for the instruction required and in the manner specified by the first section of this act, for all pupils in each and every school under his jurisdiction, shall be removed from office, and the vacancy filled as in other cases. *Sec. 2, act of May 20, 1886 (24 Stat. 69).*

2696. No study on Sunday.—The Secretary of War shall so arrange the course of studies at the Academy that the cadets shall not be required to pursue their studies on Sunday. *R. S. 1324.*

2697. Deficient cadets reexamined.— * * * *Provided*, That whenever a cadet shall fail to pass any required examination because deficient in any one subject of instruction he shall have the right to apply for a second examination regarding such subject by making written application therefor to the Academic Board within ten days after being officially notified of such failure. The examination demanded shall be held within sixty days from the date of such application, and if the cadet being otherwise qualified shall pass the same by compliance with the requirements existing at the time of the first examination, he shall be readmitted to the academy: *Provided further*, That this proviso shall apply to those former cadets who failed in not more than two subjects during the current year who shall make application for such examination within twenty days after the approval of this Act: *Provided further*, That any cadet who fails to pass any required examination shall have no more than one reexamination: * * * *Act of Aug. 11, 1916 (39 Stat. 493).*

2698. Reappointment of discharged deficient cadets.—No cadet who is reported as deficient, in either conduct or studies, and recommended to be discharged from the Academy shall, unless upon recommendation of the academic board, be returned or reappointed, or appointed to any place in the Army before his class shall have left the Academy and received their commissions. *R. S. 1325.*

Notes of Decisions.

Reappointment.—Congress had authority to thus limit or restrict the authority of the President to appoint cadets. And this section prohibits the returning or reappointing of a cadet to the Military Academy, except upon the recommendation of the academic board. It is not within the authority of the President, in opposition to an adverse recommendation of the academic

board of the Military Academy, to revoke an order of the Secretary of War for the discharge of a cadet and to restore him to the academy to take his place in the next succeeding first class. That order, having been completely executed, is beyond the power of revocation. (1881) 17 Op. Atty. Gen. 67.

2699. Appointment of discharged cadets in the Marine Corps.— * * * *Provided further*, That no midshipman at the United States Naval Academy or cadet at the United States Military Academy who fails to graduate therefrom shall be eligible for appointment as a commissioned officer in the Marine Corps

until after the graduation of the class of which he was a member. *Act of Aug. 29, 1916 (39 Stat. 611).*

2700. Hazing.—That the superintendent of the United States Military Academy, subject to the approval of the Secretary of War, shall make appropriate regulations for putting a stop to the practice of hazing, such regulations to prescribe dismissal, suspension, or other adequate punishments for infractions of the same, and to embody a clear definition of hazing.

That any cadet who shall be charged with offenses under such regulations which would involve his dismissal from the academy shall be granted, upon his written request, a trial by a general court-martial, and any cadet dismissed from the academy for hazing shall not thereafter be reappointed to the corps of cadets nor be eligible for appointment as a commissioned officer in the Army or Navy or Marine Corps until two years after the graduation of the class of which he was a member. *Act of March 2, 1901 (31 Stat. 911), as amended by act of April 19, 1910 (36 Stat. 523).*

The above was a proviso of the Military Academy appropriation act for the fiscal year 1902, which superseded a previous provision, that any cadet dismissed for hazing should not be eligible to reappointment, made by act of Mar. 31, 1884 (23 Stat. 7).

2701. Cadets to be tried by courts-martial.—The superintendent of the Military Academy shall have power to convene general courts-martial for the trial of cadets, and to execute the sentences of such courts, except the sentences of suspension and dismissal, subject to the same limitations and conditions now existing as to other general courts-martial. *R. S. 1526.*

Notes of Decisions.

Courts-martial.—Cadets are soldiers, receiving the pay of sergeants, and bound to perform military duty in such places and on such service as the commander in chief shall order, and the corps to which they are attached is a part of the military peace establishment. As a part of the Corps of Engineers they form a part of the land forces of the United States, and have been constitutionally subjected by Congress to the Rules and Articles of War and to trial by court-martial. (1819) 1 Op. Atty. Gen. 278. And see (1821) 1 Op. Atty. Gen. 469; (1855) 7 Op. Atty. Gen. 823.

Status of cadets.—The cadets of the Military Academy at West Point apart from by law to the Corps of Engineers, are therefore a part of the land force of the United States, and as such are subject to the rules and articles of war. But they are not "noncommissioned" officers of the acts of Congress and the general regulations, which expression means "sergeants and corporals," and is inapplicable to the cadets. They are inchoate officers of the Army, and subject by statute and regulation to no discipline incompatible with that character. (1855) 7 Op. Atty. Gen. 323.

2702. Pay and ration of cadets.—The pay of cadets for the fiscal year ending June 30, 1921, shall be fixed at \$780 per annum and one ration per day or commutation thereof at the rate of \$1.08 per ration, to be paid from the appropriation for the subsistence of the Army: *Provided*, That the sum of \$250 shall be credited to each cadet now at the academy and to each cadet discharged since January 1, 1919, to the extent of paying any balance due by any such cadet to the academy on account of initial clothing and equipment issued to him. *Act of March 30, 1920 (41 Stat. 538).*

The pay of cadets was fixed by the act of Mar. 16, 1802 (2 Stat. 137), at \$16 per month and two rations per day. By the act of Mar. 3, 1857 (11 Stat. 252), their pay was fixed at \$32 per month. Sec. 3 of the act of Apr. 1, 1864 (13 Stat. 39), contained the requirement that the cadets at the Military Academy should receive the same pay (\$500 per annum) as the midshipmen at the Naval Academy; sec. 2 of the act of Feb. 28, 1867 (14 Stat. 416), contained the requirement that they should also be entitled to the ration (\$109.50 annual commutation value) then allowed to active midshipmen.

This fixed the pay and emoluments of a cadet at \$600.50 per annum. The act of June 30, 1882 (27 Stat. 515), contained the requirement that no cadet should thereafter "receive more than at the rate of five hundred and forty dollars a year."

The pay of cadets was fixed by the act of June 28, 1902 (32 Stat. 409), at \$500 per annum and one ration per day, or commutation therefor, such commutation to be 30 cents per day, to be paid from the appropriation for the subsistence of the Army. By the act of May 11, 1908 (35 Stat. 108), their pay was fixed at \$800 a year. Act of May 28, 1908 (35 Stat. 405), provided that thereafter cadets should be entitled to rations, or commutation therefor, as hitherto allowed under the act approved June 28, 1902. Act of Mar. 4, 1919 (40 Stat. 1336), provided that for fiscal year ending June 30, 1920, the pay of cadets should be fixed at \$780 per annum and one ration per day, or commutation therefor at the rate of 68 cents per ration, to be paid from the appropriation for the subsistence of the Army.

A person appointed to a position in the Army, either as a cadet or an officer, becomes a cadet or officer de facto when he accepts the appointment; but, in view of the act of July 2, 1862 (12 Stat. 502), his pay can not commence until he takes the oath of office. When a candidate passes the examinations and enters upon the duties of a cadet he thereby accepts his appointment, and his service in the Army begins, but his pay can not commence until he takes the oath of office required by law. 3 Dig. 2d Comp. Dec., par. 884.

Fourteen dollars a month shall be deposited with the Treasurer from the pay of each cadet, to be applied, at the time of his graduation, to the purchase of a uniform and equipment. Par. 73, Reg. U. S. M. A., 1916.

The act of Nov. 4, 1918 (40 Stat. 1032), provided that the United States Military Academy cadets of the classes of 1920 and 1921 who have been ordered by military authority to graduate Nov. 1, 1918, and to provide themselves with the full personal equipment required for immediate active service overseas shall be credited with so much of their respective full course personal equipment allowances as may remain unpaid at the said date of their graduation.

2703. Graduation leave for instructors at training camps.—That the service of graduates of the Military Academy may be utilized during the months of June, July, August, and September of the year in which they graduate as instructors at the citizens' training camps, and their graduation leave may be taken at the termination of their services as instructors at these camps. *Chap. XVIII, act of July 9, 1918 (40 Stat. 892).*

2704. Band.—The Military Academy Band shall hereafter consist of one teacher of music, who shall be the leader of the band, one enlisted band sergeant and assistant leader, and of fifty enlisted musicians. The teacher of music shall receive the pay and have the rank of a first lieutenant, not mounted; the enlisted band sergeant and assistant leader shall receive \$972 per year; and of the enlisted musicians of the band, fifteen shall each receive \$51 per month, fifteen shall receive \$44 per month, and the remaining twenty shall each receive \$38 per month, and each of the aforesaid enlisted men shall also be entitled to the clothing, fuel, rations, and other allowances of musicians of the Regular Army; and the said teacher of music, the band sergeant and assistant leader, and the enlisted musicians of the band shall be entitled to the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and length of service as are, or may hereafter become, applicable to other officers or enlisted men of the Army. *R. S. 1111, as amended by the act of June 27, 1918 (40 Stat. 623).*

See 2676, ante.

The act of Mar. 30, 1920 (41 Stat. 539), provides for one band sergeant and assistant leader, and 50 enlisted musicians for the Military Academy band.

See also 2692, ante.

2705. Music furnished outside the reservation by the band.— * * * *Provided*, That the band or members thereof and the field musicians of the Military Academy shall not receive remuneration for furnishing music outside the

limits of the military reservation when the furnishing of such music places them in competition with local civilian musicians. *Act of May 28, 1908 (35 Stat. 432).*

2706. Strength of the General Army Service, Quartermaster's Department, and the Cavalry detachments.— * * * *Provided*, That the detachments of enlisted men at the Military Academy, heretofore designated as the General Army Service, Quartermaster's Department, and the cavalry detachment, shall be fixed at such numbers, not exceeding two hundred and fifteen enlisted men in both detachments, as in the opinion of the Secretary of War the necessities of the public service may from time to time require; but the number of enlisted men of the Army shall not be increased on account of this proviso or the two preceding paragraphs of this act. *Act of Feb. 10, 1897 (29 Stat. 519).*

The act of June 20, 1890 (26 Stat. 187), directed that the Artillery detachment at West Point be absorbed into the General Army Service, Quartermaster's Department, on duty at that post. Special provision for the pay of detachments on duty at the academy was not made until comparatively recent years.

The act of Jan. 16, 1895 (28 Stat. 627), provided for a detachment of Army service men in the Quartermaster's Department, and for a Cavalry detachment. An Artillery detachment was provided for by the act of June 8, 1900 (31 Stat. 647), and an Engineer detachment by the act of Aug. 9, 1912 (37 Stat. 254). The number in each detachment has been fixed in each case by subsequent annual appropriation acts, subject to the limitations of the above act. The act of Mar. 30, 1920 (41 Stat. 539-541), provides for all these detachments and also for a Signal Corps detachment and a Coast Artillery detachment.

2707. Engineer detachment.—Hereafter there shall be maintained at the United States Military Academy an engineer detachment, which shall consist of one first sergeant, one quartermaster sergeant, eight sergeants, ten corporals, two cooks, two musicians, thirty-eight first-class privates, and thirty-eight second-class privates;

For pay of such engineer detachment, twenty-four thousand dollars; additional pay for length of service, six thousand four hundred and eight dollars: *Provided*, That the enlisted men of said detachment shall receive the same pay and allowances as are now or may be hereafter authorized for corresponding grades in the battalions of engineers: *Provided further*, That nothing herein shall be so construed as to authorize an increase in the total number of enlisted men of the Army now authorized by law. *Act of Aug. 9, 1912 (37 Stat. 254).*

The number of men in this detachment has been fixed by successive acts making appropriations for the Military Academy.

A previous provision relating to the pay and allowances of the acting first sergeant of the detachment of Engineers, made by act of Mar. 3, 1911 (36 Stat. 1019), was superseeded by these provisions of this act.

The act of Mar. 30, 1920 (41 Stat. 540), makes provision for pay of an Engineer detachment composed of 13 sergeants, 12 corporals, 3 cooks, 2 musicians, 38 privates, first class, and 50 privates.

2708. Vacant.

2709. Additional pay of certain enlisted men.—The non-commissioned officer in charge of mechanics and other labor at the Military Academy, the soldier acting as clerk in the adjutant's office, and the four enlisted men in the philosophical and chemical departments and lithographic office, shall receive fifty dollars a year additional pay. *R. S. 1341.*

Recent acts making appropriations for the Military Academy contain no provisions corresponding to the above.

Provision for extra pay of enlisted men stationed at West Point was regularly included in the acts making appropriations for the Military Academy, including the act of May 20, 1920.

2710. Overseer of waterworks.—*Provided*, That from the foregoing appropriations for waterworks, or from any appropriation that may hereafter be made for waterworks, a sum not to exceed seventy-five cents per day may be paid as extra-duty pay to the overseer, when such overseer is a soldier detailed for that duty. *Act of Mar. 2, 1901 (31 Stat. 920).*

The provision of this act was repeated in the Military Academy appropriation act for the fiscal year 1903, act of June 28, 1902 (32 Stat. 418), but was omitted from subsequent similar acts, and in each of them an appropriation was made, under the heading "Pay of civilians," for an overseer of the waterworks. The provision for the fiscal year 1921 was by act of Mar. 20, 1920 (41 Stat. 543).

2711. Public documents for the library.—The Secretary of the Senate shall furnish annually to the library of the Academy one copy of each document published, during the preceding year, by the Senate. *R. S. 1332.*

The library of the Military Academy was constituted a designated depository of Government publications by sec. 98, act of Jan. 12, 1895 (28 Stat. 624), 190, ante.

2712. Cullum Memorial Hall.—That the memorial hall to be erected under the provisions of this act shall be a receptacle of statues, busts, mural tablets, and portraits of distinguished and deceased officers and graduates of the Military Academy, of paintings of battle scenes, trophies of war, and such other objects as may tend to give elevation to the military profession; and to prevent the introduction of unworthy subjects into this hall the selection of each shall be made by not less than two-thirds of the members of the entire academic board of the United States Military Academy, the vote being taken by ayes and nays and to be so recorded. *Sec. 6, act of July 23, 1892 (27 Stat. 263).*

This section was part of an act to accept a bequest made by Gen. George W. Cullum for the erection of a memorial hall at West Point, and to carry the terms and conditions of the same into execution.

Other sections of the act accepted the bequest mentioned, created a board of trustees of the Memorial Hall, provided for the erection of a suitable structure for the purpose and the expenditure of the funds from the bequest therefor, and for the transfer of the building after its construction to the Government.

2713. Building for religious worship.—That the Secretary of War, in his discretion, may authorize the erection of a building for religious worship by any denomination, sect, or religion on the West Point Military Reservation: *Provided*, That the erection of such building will not interfere with the uses of said reservation for military purposes. Said building shall be erected without any expense whatever to the Government of the United States, and shall be removed from the reservation, or its location changed by the denomination, sect, or religious body erecting the same whenever, in the opinion of the Secretary of War, public or military necessity shall require it, and without compensation for such building or any other expense whatever to the Government. *Act of July 8, 1898 (30 Stat. 722).*

Notes of Decisions.

<p>Roman Catholic chapel.—Prior to the enactment of this section it was held that the Secretary of War had no power to accept for the Government a donation of</p>	<p>a building to be erected upon the military reservation at West Point for its use in perpetuity by Roman Catholics. (1897) 21 Op. Atty. Gen. 537.</p>
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2714. Hotel.—That the Secretary of War is hereby authorized to lease land on the United States Military Reservation at West Point, for a term of not exceeding fifty years, to any corporation, company, or individual, upon which to erect a hotel, and all other necessary buildings in connection therewith, in

accordance with plans and specifications submitted to and recommended by the Superintendent of the Military Academy, and approved by the Secretary of War. Said lease shall contain such conditions, terms, reservations and covenants, as may be agreed upon and shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease. *Act of March 4, 1919 (40 Stat. 1348), as amended by act of March 30, 1920 (41 Stat. 548).*

The act of Mar. 4, 1919 (40 Stat. 1348), read as follows: " * * * The Secretary of War is hereby authorized to allow any corporation, company, or individual to erect on the United States Military Academy reservation at West Point, New York, a hotel in accordance with plans and specifications to be approved by the Superintendent of the United States Military Academy and to enjoy the revenue therefrom for a period of fifty years; after which time said hotel shall become the property of the United States: *Provided*, That the title and ownership of said hotel may be accepted by the Secretary of War on the behalf of the United States at any time. That said hotel shall be conducted under such regulations including the rates and the charges for accommodations thereat as may be promulgated by the Superintendent of the United States Military Academy under the direction of the Secretary of War. * * * "

2715. Contingencies for the superintendent.—Contingencies for superintendent of the academy, \$3,000. *Act of March 30, 1920 (41 Stat. 544).*

Also, that all funds arising from the rent of the hotel on Academy grounds, and other incidental sources, from and after this date be, and are hereby, made a special contingent fund, to be expended under the supervision of the Superintendent of the Academy, and that he be required to account for the same annually, accompanied by proper vouchers to the Secretary of War. *Act of May 1, 1888 (25 Stat. 112).*

2716. Sale of gas.— * * * *Provided*, That all proceeds of sales of gas be paid into the post fund. *Act of Mar. 1, 1893 (27 Stat. 520).*

2717. Sale of unnecessary or unserviceable stores.— * * * *And provided*, That hereafter, when any machinery, apparatus implements, supplies, or materials which have been heretofore or may hereafter be purchased or acquired from appropriations made for the support of the United States Military Academy are no longer needed or are no longer serviceable, they may be sold in such manner as the superintendent may direct; and that the proceeds shall be turned into the Treasury as miscellaneous receipts. *Act of March 4, 1919 (40 Stat. 1347), making appropriations for the support of the Military Academy.*

2718. Purchase of supplies.— * * * *Provided*, That all technical and scientific supplies for the departments of instruction of the Military Academy shall be purchased by contract or otherwise, as the Secretary of War may deem best. *Act of March 30, 1920 (41 Stat. 545-546).*

Similar provisions appear in previous appropriation acts.

2719. Settlement of accounts with other bureaus.—*And provided further*, That hereafter in settling transactions between appropriations for the support of the United States Military Academy and other bureaus of the War Department, or between the United States Military Academy and any other executive department of the Government, payment therefor shall be made by the disbursing officer of the United States Military Academy or of the office, bureau, or department concerned. *Act of Aug. 11, 1916 (39 Stat. 504).*

2720. Wharfage dues.—The Secretary of War is authorized to have collected from vessels using the wharf and ferry slip at West Point, New York, such wharfage dues as he may deem just, reasonable, and necessary, the same to be

paid at the time of landing to the post quartermaster or his authorized agent. *Act of Mar. 4, 1915 (38 Stat. 1137).*

2721. Maintenance, United States Military Academy, fund.—For the purpose of accounting only, all funds hereinbefore appropriated under the titles "Current and ordinary expenses," "Miscellaneous items and incidental expenses," and "Buildings and grounds," shall be disbursed and accounted for by the disbursing officer, United States Military Academy, as "Maintenance, United States Military Academy," and for that purpose shall constitute one fund. *Act of March 30, 1920 (41 Stat. 547).*

Notes of Decisions.

Appropriations.—The post of West Point is one of the military posts of the United States, and the appropriation for the construction of buildings at military posts is applicable to the erection of such quarters as are for the use of the military post at that place and independent of the Military Academy located there. 5 Comp. Dec. 812; 3 Dlg. Dec. Sec. Comp., 216.

Expenditures for the support of the Military Academy must be limited to the amounts appropriated in the acts for the support of the academy, unless a contrary purpose on the part of Congress clearly appears in its legislation. Id., 216.

2722. Pay fund.—All the money hereinbefore appropriated for pay of the Military Academy shall be disbursed and accounted for by the disbursing officer of the United States Military Academy as pay of the Military Academy, and for that purpose shall constitute one fund. *Act of March 30, 1920 (41 Stat. 544).*

2723. Cadet store working fund.—That \$150,000 are hereby appropriated for use of the treasurer, United States Military Academy, as a working fund to enable him to keep stock in cadet store, cadet mess, and cadet laundry during the continuance of the present system of cadet instruction at the United States Military Academy: *Provided further*, That in case a four-year course is reestablished that this amount shall remain available for use of treasurer of the United States Military Academy until such time as the equipment fund of cadets shall have reached the same amount. *Act of Nov. 4, 1918 (40 Stat. 1032), making appropriations for the support of the Military Academy.*

2724. Board of Visitors.—That hereafter the Board of Visitors to the Military Academy shall consist of five members of the Committee on Military Affairs of the Senate and seven members of the Committee on Military Affairs of the House of Representatives, to be appointed by the respective chairmen thereof; the members so appointed shall visit the Military Academy annually at such time as the chairman of said committees shall appoint, and the members from each of said committees may visit said academy together or separately as the said committees may elect during the session of Congress; and the superintendent of the academy and the members of the Board of Visitors shall be notified of such date by the chairman of the said committees. The expenses of the members of the board shall be their actual expenses while engaged upon their duties as members of said board not to exceed five dollars per day and their actual expenses of travel by the shortest mail routes: *Provided further*, That so much of sections thirteen hundred and twenty-seven, thirteen hundred and twenty-eight, and thirteen hundred and twenty-nine, Revised Statutes of the United States, as is inconsistent with the provisions of this Act are hereby repealed. *Act of May 28, 1908 (35 Stat. 436), as amended by act of Aug. 9, 1912 (37 Stat. 257).*

The board of visitors was established by R. S. 1327, which provided for the appointment of such a board every year. The provisions of that section relating to the manner of appointment of such board, the persons to be appointed, and their attendance at the annual examination, were superseded by the provisions of act of May 28, 1908, repeated and reenacted in act of Mar. 4, 1909 (35 Stat. 1033), and amended as above.

The other provisions of this section, specifying the nature and amount of compensation to members of the board, were superseded by provisions for payment of mileage and a per diem for expenses during their service at West Point, made by sec. 1. act of June 11, 1878 (20 Stat. 110), and those provisions were superseded by the provisions, as to expenses of members of the board of act of May 28, 1908, amended by the above act.

2725. Payment of expenses of the Board of Visitors.—No compensation shall be made to the members of said board beyond the payment of their expenses for board and lodging while at the Academy, and an allowance, not exceeding eight cents a mile, for traveling by the shortest mail-route from their respective homes to the Academy, and thence to their homes. *R. S. 1329.*

2726. Duties of the Board of Visitors.—It shall be the duty of the board of visitors to inquire into the actual state of the discipline, instruction, police administration, fiscal affairs, and other concerns of the Academy. The visitors appointed by the President shall report thereon to the Secretary of War, for the information of Congress, at the commencement of the session next succeeding such examination, and the Senators and Representatives designated as visitors shall report to Congress, within twenty days after the meeting of the session next succeeding the time of their appointment, their action as such visitors, with their views and recommendations concerning the Academy. *R. S. 1328.*

The words of this section, "appointed by the President," were superseded by 2724, ante.

CHAPTER 41.

THE UNIFORM.

Discrimination against persons wearing uniforms, 2727.	Organizations and persons permitted to wear uniforms, 2733.
Unlawful wearing of national uniform, 2728.	Distinctive mark, 2734.
National uniform worn by former officers:	Insignia of rank of Army officers not to be copied, 2735.
Veterans of wars, 2729.	Unauthorized wearing of official uniform of a friendly nation, 2736.
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2727. Discrimination against persons wearing uniforms.—That hereafter no proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the District of Columbia, or in any Territory, the District of Alaska or Insular possession of the United States, shall make, or cause to be made, any discrimination against any person lawfully wearing the uniform of the Army, Navy, Revenue-Cutter Service or Marine Corps of the United States because of that uniform, and any person making, or causing to be made, such discrimination shall be guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars. *Act of Mar. 1, 1911 (36 Stat. 963).*

2728. Unlawful wearing of the national uniform.—It shall be unlawful for any person not an officer or enlisted man of the United States Army, Navy, or Marine Corps to wear the duly prescribed uniform of the United States Army, Navy, or Marine Corps, or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy, or Marine Corps: * * *

Any person who offends against the provisions of this section shall, on conviction, be punished by a fine not exceeding \$300, or by imprisonment not exceeding six months, or by both such fine and imprisonment. *Sec. 125, act of June 3, 1916 (39 Stat. 216-217).*

That section 125 of the Act entitled "An Act for making further and more effectual provisions for the national defense, and for other purposes," approved June 3, 1916, shall hereafter be in full force and effect as originally enacted, notwithstanding anything contained in the Act entitled "An Act permitting any person who has served in the United States Army, Navy, or Marine Corps in the present war to retain his uniform and personal equipment and to wear the same under certain conditions," approved February 28, 1918: *Provided*, That the words "or the Secretary of the Navy" shall be inserted immediately after the words "the Secretary of War" wherever those words appear in section 125 of the Act approved June 3, 1916, hereinbefore referred to. *Sec. 8, act of June 4, 1920 (41 Stat. 136).*

For act of Feb. 28, 1919, apparently intended by "1918," above, see ante, 985.

2729. National uniform worn by former officers.— * * * *Provided*, That the foregoing provision shall not be construed * * * nor to prevent persons who in time of war have served honorably as officers of the United States

Army, Navy, or Marine Corps, Regular or Volunteer, and whose most recent service was terminated by an honorable discharge, muster out, or resignation, from wearing, upon occasions of ceremony, the uniform of the highest grade they have held by brevet or other commission in such Regular or Volunteer service; * * * *Sec. 125, act of June 8, 1916 (39 Stat. 216).*

2730. National uniform worn by officers who served in the Civil War.—That all officers who have served during the rebellion as officers of the Regular Army of the United States, and have been honorably discharged or resigned from the service, shall be entitled to bear the official title, and, upon occasions of ceremony, to wear the uniform of the highest grade they have held, by brevet or other commission, as is now authorized for officers of volunteers by section twelve hundred and twenty-six, Revised Statutes. *Act of Feb. 4, 1897 (29 Stat. 511).*

2731. National uniform worn by volunteer officers who served in the Civil War.—All officers who have served during the rebellion as volunteers in the Army of the United States, and have been honorably mustered out of the volunteer service, shall be entitled to bear the official title, and, upon occasions of ceremony, to wear the uniform of the highest grade they have held, by brevet or other commissions, in the volunteer service. The highest volunteer rank which has been held by officers of the Regular Army shall be entered, with their names, respectively, upon the Army Register. But these privileges shall not entitle any officer to command, pay, or emoluments, *R. S. 1226.*

2732. National uniform worn by officers who served in the war with Spain or since.—That all officers who have served during the war with Spain or since, as officers of the Regular or Volunteer Army of the United States, and have been honorably discharged from the service by resignation or otherwise, shall be entitled to bear the official title and upon occasions of ceremony, to wear the uniform of the highest grade they have held by brevet or other commission in the regular or volunteer service. *Sec. 34, act of Feb. 2, 1901 (31 Stat. 757).*

2733. Organizations and persons permitted to wear uniforms.— * * * *Provided,* That the foregoing provision shall not be construed so as to prevent officers or enlisted men of the National Guard from wearing, in pursuance of law and regulations, the uniform lawfully prescribed to be worn by such officers or enlisted men of the National Guard; nor to prevent members of the organization known as the Boy Scouts of America, or the Naval Militia, or such other organizations as the Secretary of War may designate, from wearing their prescribed uniforms; * * * nor to prevent the members of military societies composed entirely of honorably discharged officers or enlisted men, or both, of the United States Army, Navy, or Marine Corps, Regular or Volunteer, from wearing, upon occasions of ceremony, the uniform duly prescribed by such societies to be worn by the members thereof; nor to prevent the instructors and members of the duly organized cadet corps of a State university, State college, or public high school offering a regular course in military instruction from wearing the uniform duly prescribed by the authorities of such university, college, or public high school for wear by the instructors and members of such cadet corps; nor to prevent the instructors and members of the duly organized cadet corps of any other institution of learning offering a regular course in military instruction, and at which an officer or enlisted man of the United States Army, Navy, or Marine Corps is lawfully detailed for duty as instructor in military science and tactics, from wearing the uniform duly prescribed by the authori-

ties of such institution of learning for wear by the instructors and members of such cadet corps; nor to prevent civilians attendant upon a course of military or naval instruction authorized and conducted by the military or naval authorities of the United States from wearing, while in attendance upon such course of instruction, the uniform authorized and prescribed by such military or naval authorities for wear during such course of instruction; nor to prevent any person from wearing the uniform of the United States Army, Navy, or Marine Corps in any playhouse or theater or in moving-picture films while actually engaged in representing therein a military or naval character not tending to bring discredit or reproach upon the United States Army, Navy, or Marine Corps: * * * *Sec. 125, act of June 3, 1916 (39 Stat. 216).*

2734. Distinctive mark to distinguish uniforms.— * * * *Provided further.* That the uniforms worn by officers or enlisted men of the National Guard, or by the members of the military societies or the instructors and members of the cadet corps referred to in the preceding proviso shall include some distinctive mark or insignia to be prescribed by the Secretary of War to distinguish such uniforms from the uniforms of the United States Army, Navy, and Marine Corps: * * * *Sec. 125, act of June 3, 1916 (39 Stat. 217).*

2735. Insignia of rank of Army officers not to be used by others.— * * * *And provided further,* That the members of the military societies and the instructors and members of the cadet corps hereinbefore mentioned shall not wear the insignia of rank prescribed to be worn by officers of the United States Army, Navy, or Marine Corps, or any insignia of rank similar thereto. * * * *Sec. 125, act of June 3, 1916 (39 Stat. 217).*

2736. Unauthorized wearing of the uniform of a friendly nation.—That it shall be unlawful for any person, with intent to deceive or mislead, within the United States or Territories, possessions, waters, or places subject to the jurisdiction of the United States, to wear any naval, military, police, or other official uniform, decoration, or regalia of any foreign State, nation, or Government with which the United States is at peace, or any uniform, decoration, or regalia so nearly resembling the same as to be calculated to deceive, unless such wearing thereof be authorized by such State, nation, or Government.

Any person who violates the provisions of this Act shall upon conviction be punished by a fine not exceeding \$300 or imprisonment for not exceeding six months, or by both such fine and imprisonment. *Act of July 8, 1918 (40 Stat. 821).*

CHAPTER 42.

DECORATIONS OF HONOR.

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2737. Tender of foreign decorations.—That hereafter any present, decoration, or other thing which shall be conferred or presented by any foreign government to any officer of the United States, civil, naval, or military, shall be tendered through the Department of State, and not to the individual in person, but such present, decoration, or other thing shall not be delivered by the Department of State unless so authorized by act of Congress. *Sec. 3, act of Jan. 31, 1881 (21 Stat. 604).*

Sec. 1 of this act authorized certain officers named to accept certain decorations, medals, and presents, specified therein, from foreign governments. It is omitted as private and temporary merely.

Notes of Decisions.

Consent of Congress.—This section does not authorize the delivery of such presents or decorations to any particular class of officers, or to any officer, unless authority

therefor be first obtained by act of Congress, as required by Const. art. II, sec. 2, par. 2. (1909) 27 Op. Atty. Gen. 219.

2738. Foreign decorations not to be worn.—That no decoration, or other thing the acceptance of which is authorized by this act, and no decoration heretofore accepted, or which may hereafter be accepted, by consent of Congress, by any

officer of the United States, from any foreign government, shall be publicly shown or exposed upon the person of the officer so receiving the same. *Sec. 2, act of Jan. 31, 1881 (21 Stat. 604).*

Officers of the United States are prohibited from accepting, without the consent of Congress, any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state, by Const. art. 1, sec. 9, cl. 8.

2739. Foreign decorations bestowed by cobelligerents of the United States.—That any and all members of the military forces of the United States serving in the present war be, and they are hereby, permitted and authorized to accept during the present war or within one year thereafter, from the Government of any of the countries engaged in war with any country with which the United States is or shall be concurrently likewise engaged in war, such decorations, when tendered, as are conferred by such Government upon the members of its own military forces; and the consent of Congress required therefor by clause eight of section nine of Article I of the Constitution is hereby expressly granted: *Provided, That any officer or enlisted man of the military forces of the United States is hereby authorized to accept and wear any medal or decoration heretofore bestowed by the Government of any of the nations concurrently engaged with the United States in the present war. Act of July 9, 1918 (40 Stat. 872).*

Notes of Decisions.

Construction.—This provision authorizes the Department of State to deliver to naval officers of the United States medals and decorations heretofore tendered to such officers through said Department by the Governments of nations concurrently en-

gaged with the United States in the World War. (1919) 31 Op. Atty. Gen. 446.

The words "medals or decorations" are used in their usual meaning and do not include such articles as bows, caps and photographs. *Id.*

2740. Foreign decorations bestowed on civilians.—That American citizens who have received, since August first, nineteen hundred and fourteen, decorations or medals for distinguished service in the armies or in connection with the field service of those nations engaged in war against the Imperial German Government, shall, on entering the military service of the United States, be permitted to wear such medals or decorations. *Act of July 9, 1918 (40 Stat. 872).*

2741. Continuous honorable service requisite for the award of a decoration.— * * * but no medal, cross, bar, or other device, heretofore authorized, shall be awarded or presented to any individual whose entire service subsequently to the time he distinguished himself shall not have been honorable; * * * *Act of July 9, 1918 (40 Stat. 872).*

2742. Award of decorations after death.—* * * but in case an individual who shall distinguish himself dies before the making of the award to which he may be entitled, the award may nevertheless be made and the medal or cross or the bar or other emblem or device presented, within three years from the date of the act justifying the award thereof, to such representative of the deceased as the President may designate; * * * *Act of July 9, 1918 (40 Stat. 871).*

2743. Foreign soldiers decorated.—That the President is authorized, under regulations to be prescribed by him, to confer such medals and decorations as may be authorized in the military service of the United States upon officers and enlisted men of the military forces of the countries concurrently engaged with the United States in the present war. *Act of July 9, 1918 (40 Stat. 872).*

2744. Award by a commanding general in the field.—That the President be, and he is hereby, authorized to delegate, under such conditions, regulations, and limitations as he shall prescribe, to the commanding general of a separate army or higher unit in the field, the power conferred upon him by this Act to award the medal of honor, the distinguished-service cross, and the distinguished-service medal; * * * *Act of July 9, 1918 (40 Stat. 872).*

2745. Time limit for awards.—That, except as otherwise prescribed herein, no medals of honor, distinguished-service cross, distinguished-service medal, or bar or other suitable device in lieu of either of said medals or of said cross, shall be issued to any person after more than three years from the date of the act justifying the award thereof, nor unless a specific statement or report distinctly setting forth the distinguished service and suggesting or recommending official recognition thereof shall have been made at the time of the distinguished service or within two years thereafter, nor unless it shall appear from the official records in the War Department that such person has so distinguished himself as to entitle him thereto; * * * *Act of July 9, 1918 (40 Stat. 871).*

2746. Time limit for awards extended under changed regulations.—* * * but in cases of officers and enlisted men now in the Army for whom the award of the medal of honor has been recommended in full compliance with then existing regulations but on account of services which, though insufficient fully to justify the award of the medal of honor, appear to have been such as to justify the award of the distinguished-service cross or distinguished-service medal hereinbefore provided for, such cases may be considered and acted upon under the provisions of this Act authorizing the award of the distinguished-service cross and distinguished-service medal, notwithstanding that said services may have been rendered more than three years before said cases shall have been considered as authorized by this Act, but all consideration of and action upon any of said cases shall be based exclusively upon official records now on file in the War Department; and in the cases of officers and enlisted men now in the Army who have been mentioned in orders, now a part of official records, for extraordinary heroism or especially meritorious services, such as to justify the award of the distinguished-service cross or the distinguished-service medal hereinbefore provided for, such cases may be considered and acted on under the provisions of this Act, notwithstanding that said act or services may have been rendered more than three years before said cases shall have been considered as authorized by this Act, but all consideration of and action upon any said cases shall be based exclusively upon official records of the War Department. *Act of July 9, 1918 (40 Stat. 872).*

2747. Same decoration issued but once to the same person.—That no more than one medal of honor or one distinguished-service cross or one distinguished-service medal shall be issued to any one person; * * * *Act of July 9, 1918 (40 Stat. 871), as amended by act of Jan. 24, 1920 (41 Stat. 399).*

2748. Medals of honor of earliest design not surrendered.—That the holders of medals of honor under the Act approved July twelfth, eighteen hundred and sixty-two, and section six of the Act approved March third, eighteen hundred and sixty-three, shall not be required to surrender such medals in case such medals are replaced, in pursuance of the provisions of the Act of Congress approved April twenty-third, nineteen hundred and four; and that wherever the holders of such medals of honor have surrendered them, in order to receive the medals provided for by said Act approved April twenty-third, nineteen hundred and four, such medals shall be returned to them: *Provided, That no recipient*

of both medals shall wear both medals at the same time. *Joint resolution 17, Feb. 27, 1907 (34 Stat. 1422).*

For Res. No. 52, sec. 6, act of Mar. 3, 1863, and act of Apr. 23, 1904, mentioned in this resolution, see 2754, 2755, 2756, post.

See also, notes to 2756, post.

2749. Bars awarded for successive deeds of gallantry.—* * * but for each succeeding deed or act sufficient to justify the award of a medal of honor or a distinguished-service cross or a distinguished-service medal, respectively, the President may award a suitable bar or other suitable device, to be worn as he shall direct. * * * *Act of July 9, 1918 (40 Stat. 871), as amended by act of Jan. 24, 1920 (41 Stat. 399).*

2750. Silver stars awarded for citations in orders.—* * * And for each citation of an officer or enlisted man for gallantry in action, published in orders issued from the headquarters of a force commanded by, or which is the appropriate command of, a general officer, not warranting the award of a medal of honor or distinguished-service cross, he shall be permitted to wear, as the President shall direct, a silver star three-sixteenths of an inch in diameter. *Act of July 9, 1918 (40 Stat. 871), as amended by act of Jan. 24, 1920 (41 Stat. 399).*

2751. Replacement of lost or damaged decorations.—That in any case where the President of the United States has heretofore, under any Act or resolution of Congress, caused any medal to be made and presented to any officer or person in the United States on account of distinguished or meritorious services, on a proper showing made by such person to the satisfaction of the President that such medal has been lost or destroyed through no fault of the beneficiary, and that diligent search has been made therefor, the President is hereby authorized to cause to be prepared and delivered to such person a duplicate of such medal, the cost of which shall be paid out of any money in the Treasury not otherwise appropriated. *Joint res. 23, Apr. 15, 1904 (33 Stat. 588).*

That whenever a medal, cross, bar, ribbon, rosette, or other device presented under the provisions of this Act shall have been lost, destroyed, or rendered unfit for use, without fault or neglect on the part of the person to whom it was awarded, such medal, cross, bar, ribbon, rosette, or device shall be replaced without charge therefor. *Act of July 9, 1918 (40 Stat. 871).*

2752. Appropriation chargeable with the cost of decorations.—That the Secretary of War be, and he is hereby, authorized to expend from the appropriations for contingent expenses of his department from time to time so much as may be necessary to defray the cost of the medals of honor, distinguished-service crosses, distinguished-service medals, bars, rosettes, and other devices hereinbefore provided for. *Act of July 9, 1918 (40 Stat. 871).*

2753. Regulations.—That the President be, * * * and he is further authorized to make from time to time any and all rules, regulations, and orders which he shall deem necessary to carry into effect the provisions of this Act and to execute the full purpose and intention thereof. *Act of July 9, 1918 (40 Stat. 872).*

2754. First issue of medals of honor.—That the President of the United States be, and he is hereby, authorized to cause two thousand medals of honor to be prepared with suitable emblematic devices, and to direct that the same be presented, in the name of Congress, to such non-commissioned officers and privates as shall most distinguish themselves by their gallantry in action,

and other soldier-like qualities, during the present insurrection. *Joint Res. 52, July 12, 1862 (12 Stat. 623).*

The provisions of this resolution, as originally enacted, might be regarded as temporary merely and as executed as soon as its provisions had been carried out, but subsequent provisions for replacing the medals, etc., of a more permanent nature, were made by act of Apr. 23, 1904, post. 2756, and Joint Res. 17, Feb. 27, 1907, ante, 2748.

2755. Medal of honor established.—That the President cause to be struck, from the dies recently prepared at the United States Mint for that purpose, "medals of honor" additional to those authorized by the act (resolution) of July 12, 1862, and present the same to such officers, noncommissioned officers, and privates as have most distinguished, or may hereafter most distinguish themselves in action. *Sec. 6, act of Mar. 3, 1863 (12 Stat. 751).*

This medal was of gold, without enamel, in the form of a star, with a symbolic group in the center, surrounded by a circle of stars, and suspended from a clasp in the form of an eagle perched on two crossed cannon with eight balls beneath.

For resolution No. 52, July 12, 1862 (12 Stat. 623), mentioned in this section, see 2754, ante.

2756. Design of the medal of honor changed.—For three thousand medals of honor to be prepared, with suitable emblematic devices, upon the design of the medal of honor heretofore issued, or upon an improved design, together with appropriate rosettes or other insignia to be worn in lieu of the medal, and to be presented by direction of the President, and in the name of Congress, to such officers, noncommissioned officers, and privates as have most distinguished, or may hereafter most distinguish, themselves by their gallantry in action, twelve thousand dollars: *Provided*, That the Secretary of War be, and he is hereby, authorized and directed to use so many of the medals and rosettes or other insignia provided for by this Act as may be necessary to replace the medals that have been issued under the joint resolution of Congress approved July twelfth, eighteen hundred and sixty-two, and section six of the Act of Congress approved March third, eighteen hundred and sixty-three: *And provided further*, That whenever it shall appear from official records in the War Department that any officer or enlisted man of the Army so distinguished himself in action as to entitle him to the award of the Congressional medal of honor under the provisions of the sixth section of the Act of Congress approved March third, eighteen hundred and sixty-three, entitled "An Act making appropriations for the sundry civil expenses of the Government for the year ending June thirtieth, eighteen hundred and sixty-four, and for the year ending the thirtieth of June, eighteen hundred and sixty-three, and for other purposes," the fact that the person who so distinguished himself has since become separated from the military service, or that the award of the medal to him was not specifically recommended or applied for while he was in the said service, shall not be held to prevent the award and presentation of the medal to such person under the provisions of the law hereinbefore cited. *Act of Apr. 23, 1904 (33 Stat., 274).*

For resolution of July 12, 1862, and sec. 6, act of Mar. 3, 1863, see 2754, 2755, ante.

Notes of Decisions.

Replacing medals previously issued.—In (1905) 25 Op. Atty. Gen. 529, it was held that the word "replace," as used in this section, implies the loss, destruction, or surrender of the old medal; that it was

optional with the holder of a medal whether he should surrender his old medal for the new; but that it was not within the authority of the Secretary of War, in replacing the medals issued to officers and

privates for gallantry in action, under sections 2754, 2755, ante, to allow a particular grantee, who is entitled to a new

medal, to receive it and at the same time retain the old medal in his possession. But see 2748, ante.

2757. Medal of honor for gallantry beyond the call of duty.—That the provisions of existing law relating to the award of medals of honor to officers, noncommissioned officers, and privates of the Army be, and they hereby are, amended so that the President is authorized to present, in the name of the Congress, a medal of honor only to each person who, while an officer or enlisted man of the Army, shall hereafter, in action involving actual conflict with an enemy, distinguish himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty. *Act of July 9, 1918 (40 Stat. 870).*

The President was authorized to bestow the medal of honor upon the unidentified British and French soldiers buried, respectively, in Westminster Abbey, London, England, and in the Arc de Triomphe, Paris, France, by act of Mar. 4, 1921 (41 Stat. 2757).

Notes of Decisions.

See, also, notes to 2756, ante.

Delay in application.—A claim for a medal of honor should not be entertained where there was an unexplained delay of 28 years in presenting the claim, and it was unaccompanied by any official evidence of the statements made. (1892) 20 Op. Atty. Gen. 421.

Time within which medal may be awarded.—The President may present a medal of honor to an officer or private in the military service of the United

States who has distinguished himself in action, notwithstanding he is not in the military service at the time the case reaches the President for consideration, provided the application or recommendation therefor was made while he was in the military service. But a medal can not be awarded where the application or recommendation therefor is made after the officer or private has been discharged from the military service. (1903) 24 Op. Atty. Gen. 580.

2758. Medal of honor roll.—That there is hereby established in the War Department and Navy Department, respectively, a roll designated as "the Army and Navy medal of honor roll." Upon written application made to the Secretary of the proper department, and subject to the conditions and requirements hereinafter contained, the name of each surviving person who has served in the military or naval service of the United States in any war, who has attained or shall attain the age of sixty-five years, and who has been awarded a medal of honor for having in action involving actual conflict with an enemy distinguished himself conspicuously by gallantry or intrepidity, at the risk of his life, above and beyond the call of duty, and who was honorably discharged from service by muster out, resignation, or otherwise, shall be, by the Secretary of the proper department, entered and recorded on said roll. Applications for entry on said roll shall be made in such form and under such regulations as shall be prescribed by the War Department and Navy Department, respectively, and proper blanks and instructions shall be, by the proper Secretary, furnished without charge upon request made by any person claiming the benefits of this Act. *Sec. 1, Act of Apr. 27, 1916 (39 Stat. 53).*

2759. Certificate of right to a medal of honor pension.—That it shall be the duty of the Secretary of War and of the Secretary of the Navy to carry this Act into effect and to decide whether each applicant, under this Act, in his department is entitled to the benefit of this Act. If the official award of the medal of honor to the applicant, or the official notice to him thereof, shall appear to show that the medal of honor was awarded to the applicant for such

an act as is required by the provisions of this Act, it shall be deemed sufficient to entitle the applicant to such special pension without further investigation. Otherwise all official correspondence, orders, reports, recommendations, requests, and other evidence now on file in any public office or department shall be considered. A certificate of service and of the act of heroism, gallantry, bravery, or intrepidity for which the medal of honor was awarded, and of enrollment under this Act, and of the right of the special pensioner to be entitled to and to receive the special pension herein granted, shall be furnished each person whose name shall be so entered on said roll. The Secretary of War and the Secretary of the Navy shall deliver to the Commissioner of Pensions a certified copy of each of such of said certificates as he may issue, as aforesaid, and the same shall be full and sufficient authority to the Commissioner of Pensions for the payment by him to the beneficiary named in each such certificate the special pension herein provided for. *Sec. 2, act of Apr. 27, 1916 (39 Stat. 54).*

2760. Board to investigate awards of medals of honor.—A board to consist of five general officers on the retired list of the Army shall be convened by the Secretary of War, within sixty days after the approval of this Act for the purpose of investigating and reporting upon past awards or issues of the so-called congressional medal of honor by or through the War Department; this with a view to ascertain what medals of honor, if any, have been awarded or issued for any cause other than distinguished conduct by an officer or enlisted man in action involving actual conflict with an enemy by such officer or enlisted man or by troops with which he was serving at the time of such action. * * * Said board shall have full and free access to and use of all records pertaining to the award or issue of medals of honor by or through the War Department. The actual and necessary expenses of said board and its members shall be paid out of any appropriations available for contingent expenses of the Army of the War Department. *Sec. 122, act of June 3, 1916 (39 Stat. 214).*

The medals of honor, mentioned in this section, were authorized by 2754, 2755, 2756, 2757, ante.

2761. Recall of medals of honor.— * * * And in any case in which said board shall find and report that said medal was issued for any cause other than that hereinbefore specified the name of the recipient of the medal so issued shall be stricken permanently from the official medal of honor list. It shall be a misdemeanor for him to wear or publicly display said medal, and, if he shall still be in the Army, he shall be required to return said medal to the War Department for cancellation. * * * *Sec. 122, act of June 3, 1916 (39 Stat. 214).*

2762. Rosette and ribbon worn in lieu of the medal of honor.—That the Secretary of War be, and he is hereby, authorized to issue to any person to whom a medal of honor has been awarded, or may hereafter be awarded, under the provisions of the Joint Resolution approved July twelfth, eighteen hundred and sixty-two, and the Act approved March third, eighteen hundred and sixty-three, a rosette or knot to be worn in lieu of the medal, and a ribbon to be worn with the medal; said rosette or knot and ribbon to be each of a pattern to be prescribed and established by the President of the United States, and any appropriation that may hereafter be available for the contingent expenses of the War Department is hereby made available for the purposes of this act: *Provided*, That whenever a ribbon issued under the provisions of this act shall have been lost, destroyed, or rendered unfit for use, without fault or neglect on the part of the person to whom it was issued, the Secretary of War shall cause a new ribbon to

be issued to such person without charge therefor. *Joint res. 51, May 2, 1896 (29 Stat. 473).*

For the resolution and acts mentioned in this section, see 2754, 2759, ante.

2763. Distinguished service cross established.—That the President be, and he is hereby, further authorized to present, but not in the name of Congress, a distinguished-service cross of appropriate design and a ribbon, together with a rosette or other device, to be worn in lieu thereof, to any person who, while serving in any capacity with the Army of the United States since the sixth day of April, nineteen hundred and seventeen, has distinguished, or who shall hereafter distinguish, himself or herself by extraordinary heroism in connection with military operations against an armed enemy. *Act of July 9, 1918 (40 Stat. 870).*

2764. Distinguished service medal established.—That the President be, and he is hereby, further authorized to present, but not in the name of Congress, a distinguished-service medal of appropriate design and a ribbon, together with a rosette or other device, to be worn in lieu thereof, to any person who, while serving in any capacity with the Army of the United States since the sixth day of April, nineteen hundred and seventeen, has distinguished, or who hereafter shall distinguish, himself or herself by exceptionally meritorious service to the Government in a duty of great responsibility; * * * *Act of July 9, 1918 (40 Stat. 870-871).*

2765. Distinguished service medals issued to replace certificates of merit.—* * * and said distinguished-service medal shall also be issued to all enlisted men of the Army to whom the certificate of merit has been granted up to and including the date of the passage of this Act under the provisions of previously existing law, in lieu of such certificate of merit, and after the passage of this Act the award of the certificate of merit for distinguished service shall cease; and additional pay heretofore authorized by law for holders of the certificate of merit shall not be paid to them beyond the date of the award of the distinguished-service medal in lieu thereof as aforesaid. *Act of July 9, 1918 (40 Stat. 871).*

This section repealed R. S. 1216, as amended by sec. 1, act of Feb. 9, 1891 (26 Stat. 737), and act of Mar. 29, 1892 (27 Stat. 12), which was as follows:

"When any enlisted man of the Army shall have distinguished himself in the service the President may, at the recommendation of the commanding officer of the regiment or the chief of the corps to which such enlisted man belongs, grant him a certificate of merit."

2766. Philippine congressional medal.—That the Secretary of War be, and he is hereby, authorized and directed to procure a bronze medal, with suitable device, to be presented to each of the several officers and enlisted men and families of such as may be dead, who, having volunteered and enlisted under the calls of the President for the war with Spain, served beyond the term of their enlistment to help to suppress the Philippine insurrection, and who subsequently received an honorable discharge from the Army of the United States, or who died prior to such discharge. *Sec. 1, act of June 29, 1906 (34 Stat. 621).*

That the sum of five thousand dollars is hereby appropriated, out of any funds in the Treasury of the United States not otherwise appropriated, for the purpose of carrying this Act into effect. *Sec. 2, act of June 29, 1906 (34 Stat. 621).*

2767. Medal for service by the National Guard in the Spanish War and on the Mexican border.—That the Secretary of War be, and he is hereby, authorized and directed to procure a bronze medal, with suitable device and ribbon, to be presented to each of the several officers and enlisted men, and families of such as may be dead, of the National Guard who, under the orders of the President of the United States, served not less than ninety days in the War with Spain, and who have received an honorable discharge from the service, and who served on the Mexican border in the years nineteen hundred and sixteen and nineteen hundred and seventeen and who are not eligible to receive the Mexican service badge heretofore authorized by the President: *Provided*, That such medals shall not be issued to men who have, subsequent to such service, been dishonorably discharged from the service or deserted: * * * *Act of July 9, 1918 (40 Stat. 873).*

* * * *Provided*, That the Mexican border medal and ribbon issued to National Guard officers and enlisted men under the provisions of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1919," approved July 9, 1918, shall be issued to National Guard officers and enlisted men who at the same time served as such in the field under the call of the National Guard to such Mexican border service but were stationed for service at points other than on the Mexican border: *Provided further*, That such medals shall not be issued to men who have subsequent to such service been dishonorably discharged from the service or deserted: * * * *Act of June 5, 1920 (41 Stat. 973), making appropriations for the support of the Army: National Guard.*

Under the above statute at first one medal was issued, similar in design to the Spanish War medal now in use, except that upon the sword thereon were inscribed "1898 ¹⁹¹⁶ Congressional National Guard Medal." In January, 1919, that design was superseded by the issue of two badges, the "medal for service in the Spanish War" and the "medal for service on the Mexican border." See G. O. 8 and 76, W. D. 1919.

The award of campaign medals under existing orders takes the place of service stripes and has its origin in General Order 4, War Department, 1905, which was based on R. S. 1296, providing that "The President may prescribe the uniform of the Army" * * * Dig. Ops. J. A. G., 1912, p. 668, III B.

From time to time since the publication of the above order, other general orders of the War Department have been issued establishing badges for various wars and campaigns, and Congress has authorized medals for others, so that now the most important wars and expeditions, including the Civil War, in which the armed forces of this country have been called into action, have been recognized. These medals may be worn as part of the uniform on specified occasions as provided by orders and regulations. Appropriate ribbons, described in Special Regulations 42, may be worn on service uniforms at all times by those entitled to the medals. See Special Regulations 42.

2768. Corps badges.—All persons who have served as officers, non-commissioned officers, privates, or other enlisted men, in the Regular Army, volunteer or militia forces of the United States, during the war of the rebellion, and have been honorably discharged from the service, or still remain in the same, shall be entitled to wear, on occasions of ceremony, the distinctive Army badge ordered for or adopted by the Army corps and division, respectively, in which they served. R. S. 1227.

2769. National trophy and medals for rifle contests.—For the purpose of furnishing a national trophy and medals and other prizes to be provided and contested for annually, under such regulations as may be prescribed by the Secretary of War, said contest to be open to the Army, Navy, Marine Corps, and the National Guard or Organized Militia of the several

States, Territories, and of the District of Columbia, members of rifle clubs, and civilians, and for the cost of the trophy, prizes, and medals herein provided for, * * * *Act of June 5, 1920 (41 Stat. 971), making appropriations for the support of the Army: National trophy.*

Similar provisions appear in previous appropriation acts.

2770. Military society badges.—That the distinctive badges adopted by military societies of men who served in the armies and navies of the United States in the war of the Revolution, the war of eighteen hundred and twelve, the Mexican war, and the war of the rebellion, respectively, may be worn upon all occasions of ceremony by officers and enlisted men of the Army and Navy of the United States, who are members of said organizations in their own right. *Joint res. 50, Sept. 25, 1890 (26 Stat. 681).*

2771. Unlawful wearing of badges of military societies.—That whoever, in the District of Columbia, not being a member of the Military Order of the Loyal Legion of the United States, of the Grand Army of the Republic, of the Sons of Veterans, of the Woman's Relief Corps, of the Union Veteran's Union, of the Union Veteran Legion, of the United Spanish War Veterans, of the National Society of the Daughters of the American Revolution, and not entitled under the rules of the order to wear the same, willfully wears or uses the insignia, distinctive ribbon, or badge of membership, rosette, or button thereof, or who uses or wears the same to obtain aid or assistance thereby, shall be punished by a fine of not more than twenty dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment. *Act of Mar. 15, 1906 (34 Stat. 62).*

2772. Badges of societies of veterans of the Spanish-American war.—That the distinctive badges adopted by military societies of men "who served in the armies and navies of the United States during the Spanish-American war and the incident insurrection in the Philippines" may be worn, upon all occasions of ceremony, by officers and men of the Army and Navy of the United States who are members of said organizations in their own right. *Sec. 41, act of Feb. 2, 1901 (31 Stat. 758).*

Notes of Decisions.

<p>Persons entitled to wear.—The words "members of said organizations in their own right" include all those who, under the rules of these orders, were eligible for</p>	<p>membership, either because of their own service or because of their kinship to one who had been in the service. (1901) 23 Op. Atty. Gen. 454.</p>
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2773. Badges of societies of veterans of the Chinese relief expedition.—That the distinctive badges adopted by military societies of men who served in the armies and navies of the United States during the Chinese relief expedition of nineteen hundred may be worn upon all occasions of ceremony by officers and men of the Army and Navy of the United States who are members of said organization in their own right. *Joint res. 2, Jan. 12, 1903 (32 Stat. 1229).*

2774. Badge of the Army and Navy Union of the United States.—That the distinctive badge adopted by the Regular Army and Navy Union of the United States may be worn, in their own right, upon all public occasions of ceremony by officers and enlisted men of the Army and Navy of the United States who are members of said organization. *Joint res. 26, May 11, 1894 (28 Stat. 563).*

That the distinctive badge adopted by the Army and Navy Union of the United States may be worn, in their own right, upon all public occasions of ceremony by officers and enlisted men of the Army and Navy of the United States who are members of said organization. *Joint res. 18, Mar. 2, 1907 (34 Stat. 1423).*

CHAPTER 43.

FLAG AND SEAL OF THE UNITED STATES.

Flag:

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2775. Design of the flag.—The flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be thirty-seven stars, white in a blue field. *R. S. 1791.*

2776. Stars added to the flag.—On the admission of a new State into the Union one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding such admission. *R. S. 1792.*

2777. Disrespect to the flag in the District of Columbia.—That hereafter any person who, within the District of Columbia, in any manner, for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing or any advertisement of any nature upon any flag, standard, colors or ensign of the United States of America; or shall expose or cause to be exposed to public view any such flag, standard, colors or ensign upon which shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed any word, figure, mark, picture, design or drawing, or any advertisement of any nature; or who, within the District of Columbia, shall manufacture, sell, expose for sale or to public view or give away or have in possession for sale or to be given away or for use for any purpose, any article or substance being an article of merchandise, or a receptacle for merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed a representation of any such flag, standard, colors or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance on which so placed; or who, within the District of Columbia, shall publicly mutilate, deface, defile or defy, trample upon or cast contempt, either by word or act, upon any such flag, standard, colors or ensign, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding \$100 or by imprisonment for not more than thirty days, or both, in the discretion of the court. * * * *Act of Feb. 8, 1917 (39 Stat. 900).*

2778. Definition of the flag.—* * * The words "flag, standard, colors, or ensign," as used herein, shall include any flag, standard, colors, ensign or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purport-

ing to be either of said flag, standard, colors, or ensign of the United States of America or a picture or a representation of either, upon which shall be shown the colors, the Stars and Stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, colors, standard or ensign of the United States of America. *Act of Feb. 8, 1917 (39 Stat. 900).*

2779. Trade-marks comprising the flag.—That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark— * * *

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States or any simulation thereof, or of any State or municipality or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem, or of any name, distinguishing mark, character, emblem, colors, flag, or banner adopted by any institution, organization, club, or society which was incorporated in any State in the United States prior to the date of the adoption and use by the applicant: * * * *Sec. 5, act of Feb. 20, 1905 (33 Stat. 725), as amended by act of Jan. 8, 1913 (37 Stat. 649).*

2779½. Colors of demobilized organizations.—That the Secretary of War be, and he is hereby, authorized to permit volunteer regiments, on being mustered out of the service of the United States, to retain all of their regimental colors. Said colors shall be turned over to the State authorities to which said regiments belong, and the regimental quartermaster in making his returns may, in lieu of said colors and in full release therefor, file with the proper official of the War Department a receipt from the quartermaster-general of said State that said colors have been delivered to said State authorities. *Act of Feb. 25, 1899 (30 Stat. 890).*

That the Secretary of War be, and he hereby is, authorized to dispose of all colors, standards, and guidons of demobilized organizations of the United States Army in the following manner: Any which were used during their service by such organizations and which were brought into the service of the United States from the National Guard of any State may be returned to that State upon request therefor from the governor thereof; and all others may be sent, upon request of the governor thereof, to whatever State the Secretary of War may determine to have furnished the majority of men to any such organization at the time of its formation: *Provided, however,* That where it is impossible to determine what State furnished a majority of the men of an organization at the time of its formation, or where any organization was so cosmopolitan in its original makeup that it is impossible to identify it with any particular State, the colors of such organization will be turned in to the Quartermaster General for such national use as the Secretary of War may direct: *Provided further,* That the title to all such colors, standards, and guidons shall remain in the United States: *And provided further,* That the Secretary of War shall require assurance that proper provision has been or will be made for their care and preservation before returning or sending the same as herein authorized. *Sec. 2, act of Mar. 4, 1921 (41 Stat. 1438-1439).*

2780. Seal of the United States.—The seal heretofore used by the United States in Congress assembled is declared to be the seal of the United States. *R. S. 1793.*

An appropriation to enable the Secretary of State to have the Great Seal of the United States recut was made by the deficiency appropriation acts for the fiscal years 1902 and 1903, act of July 1, 1902 (32 Stat. 552), and act of Mar. 3, 1903 (32 Stat. 1032).

2781. Secretary of State to keep and affix the seal.—The Secretary of State shall keep such seal, and shall make out and record, and shall affix the same to, all civil commissions for officers of the United States, to be appointed by the President, by and with the advice and consent of the Senate, or by the President alone. But the seal shall not be affixed to any commission before the same has been signed by the President of the United States, nor to any other instrument, without the special warrant of the President therefor. *R. S. 1794.*

The commissions of military officers now bear the seal of the War Department, act of Mar. 28, 1896 (29 Stat. 75), ante, 2259.

Notes of Decisions.

Military commissions.—The statute excludes military commissions. *O'Shea v. U. S.* (1893), 28 Ct. Cl. 392.

2782. Fraudulent use of the seal of an executive department.—Whoever shall fraudulently or wrongfully affix or impress the seal of any executive department, or of any bureau, commission, or office of the United States, to or upon any certificate, instrument, commission, document, or paper of any description; or whoever, with knowledge of its fraudulent character, shall with wrongful or fraudulent intent use, buy, procure, sell, or transfer to another any such certificate, instrument, commission, document, or paper, to which or upon which said seal has been so fraudulently affixed or impressed, shall be fined not more than \$5,000 or imprisoned not more than five years, or both. *Sec. 1, title X, act of June 15, 1917 (40 Stat. 227).*

2783. Counterfeiting or altering seals.—Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be made, forged, counterfeited, mutilated, or altered, or shall willingly assist in falsely making, forging, counterfeiting, mutilating, or altering the seal of any executive department, or any bureau, commission, or office of the United States, or whoever shall knowingly use, affix, or impress any such fraudulently made, forged, counterfeited, mutilated, or altered seal to or upon any certificate, instrument, commission, document, or paper, of any description, or whoever with wrongful or fraudulent intent shall have possession of any such falsely made, forged, counterfeited, mutilated, or altered seal, knowing the same to have been so falsely made, forged, counterfeited, mutilated, or altered, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both. *Sec. 2, title X, act of June 15, 1917 (40 Stat. 228).*

2784. Forging or altering passes.—Whoever shall falsely make, forge, counterfeit, alter, or tamper with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with wrongful or fraudulent intent shall use or have in his possession any such pass or permit, or shall personate or falsely represent himself to be or not to be a person to whom such pass or permit has been duly issued, or shall willfully allow any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than \$2,000 or imprisoned not more than five years, or both. *Sec. 3, title X, act of June 15, 1917 (40 Stat. 228).*

CHAPTER 44.

EMPLOYMENT OF MILITARY FORCE.

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2785. Raising armies.—The Congress shall have Power * * *

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; * * * *Art. I, sec. 8, Constitution of the United States.*

Notes of Decisions.

Raising and supporting armies.—In general.—A State law imposing a tax on passengers held void, as interfering with the power of the Federal Government to declare and prosecute war, and as a necessary incident to raise and transport troops through and over territory of any State. *Crandall v. Nevada* (1867), 6 Wall. 35, 44, 18 L. Ed. 745.

Among the powers assigned to the National Government is the power "to raise

and support armies," and the power "to provide for the Government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall

be taken, the compensation he shall be allowed, and the service to which he shall be assigned. *Tarble's Case* (1871), 13 Wall. (U. S.) 397, 408, 20 L. Ed. 597.

The act providing for the reduction of the Army by mustering out certain officers, act of July 15, 1870 (16 Stat. 314), was an exercise of the power "to raise and support armies." *Street v. U. S.* (1889), 24 Ct. Cl. 230; affirmed, *Street v. U. S.* (1890), 133 U. S. 307, 10 Sup. Ct. 309, 33 L. Ed. 631.

This clause does not confer on Congress the power to designate by law a person to fill a military office, since this would be in direct conflict with the power of appointment given the President by Const. art. 2, sec. 2. (1884), 18 Op. Atty. Gen. 18, 26.

The power to raise and support armies is plenary, and without limitation or restriction. (1909), 27 Op. Atty. Gen. 260.

The power of Congress to provide for the trial and punishment of military and naval offenses, under the above and other provisions of Article 1, section 8, of the Constitution, is independent of the judicial power defined in Article 3 of the Constitution. *U. S. v. McDonald* (D. C. 1920), 265 Fed. 754.

Conscription.—The Constitution of the United States authorizes Congress to raise armies, and also to call forth and organize the militia of the several States. Under this twofold power, both regular national armies and occasional militia forces from the several States may be raised, either by conscription or in other modes. *McCall's Case* (D. C. 1863), Fed. Cas. No. 8,669.

Under the grant of power to raise and support armies and call out the militia, Congress has power to make and authorize such orders and regulations as may be nec-

essary to prevent those who are liable by law to military service from evading that duty, such as an order to prevent them from leaving the country and State, to avoid an impending draft. *Allen v. Colby* (1867), 47 N. H. 544.

Enlistment of minors.—This clause gives Congress power to enlist minors in the Army without the consent of their parents. *U. S. v. Bainbridge* (C. C. 1816), Fed. Cas. No. 14,497.

Under this clause Congress may provide for the enlistment of minors, with or without the consent of their parents, and may give such effect and conclusiveness to the contract of enlistment as it may deem best. *In re Davison* (C. C. 1884), 21 Fed. 618.

The United States has a right to prescribe the rules and conditions under which voluntary or compulsory services are to be rendered by citizens, and the period at which persons reach their majority and become sui juris with respect to the ordinary affairs of life can not abridge this power of the General Government. (1896), 21 Op. Atty. Gen. 327. See also 2168, 2169, ante.

State courts.—In view of the constitutional grant of power to Congress "to raise and support armies" and "to provide for the Government and regulation of the land and naval forces," a State judge has no jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim or color of authority, of the United States, by an officer of that Government. *Tarble's Case* (1871), 13 Wall. (N. S.) 397, 408, 20 L. Ed. 597.

2786. Calling forth the Militia.—The Congress shall have Power * * *

To provide for calling forth the militia to execute the Laws of the Union, to suppress Insurrections and repel Invasions; * * * *Art I, sec. 8, Constitution of the United States.*

For draft of the National Guard into Federal Service, see 2549, ante.

Notes of Decisions.

Power of Congress in general.—Act of May 2, 1792, act of May 8, 1792, act of Jan. 3, 1795, act of Feb. 28, 1795, and act of Apr. 18, 1814, providing for calling forth the militia to execute the laws of the United States, suppress insurrections, and repel invasion, and for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, amount to a full execution of the powers conferred on Congress by the constitution. *Houston v. Moore* (1820), 5 Wheat. 1, 12, 5 L. Ed. 19.

Congress is not deprived of its power under this clause when the necessity for its exercise is called out by civil war. *Tyler v. Defrees* (1870), 11 Wall. 331, 345, 20 L. Ed. 161.

Under the twofold power to raise armies and call forth the militia, both regular national armies, and occasional militia forces from the several States, may be raised, either by conscription or in other modes. *McCall's Case* (D. C. 1863), Fed. Cas. No. 8,669.

The provision of the Military Code that the commander in chief shall have power

to disband companies of the National Guard whenever, in his judgment, the efficacy of the State force will be thereby increased, is not in conflict with power of Congress to call forth the militia, and provide for their government while in the service of the United States. *People v. Hill* (1891), 13 N. Y. Supp. 186; judgment affirmed (1891), 126 N. Y. 497, 27 N. E. 789.

The power of commanding the service of the militia in times of insurrection and invasion is a natural incident to the duties of superintending the common defense, and of watching over the internal peace of the country, and was wisely vested in Congress by the framers of the Constitution. In re *Griner* (1863), 16 Wis. 423.

State laws.—Sec. 21, act of Pa. Mar. 28, 1814, prescribing punishment for militiamen neglecting or refusing to serve in response to call to Federal service, held valid. *Houston v. Moore* (1820), 5 Wheat. 1, 5 L. Ed. 19.

Under this and the following clause, the only instance where governmental powers may be exercised by the United States is when the militia shall be employed in the service of the United States. At all other times the whole government of the militia is within the province of the State, and therefore any legislation which the State may adopt relating to the government of the militia in no wise contracts powers conferred upon Congress, as long as it does not infringe upon the method of organization. *People v. Hill* (1891), 59 Hun, 624, 13 N. Y. Supp. 637; judgment affirmed (1891), 126 N. Y. 497, 27 N. E. 789.

Courts-martial, organized under the authority of a State, have not power, it seems, to assess fines on delinquent militiamen for not obeying a requisition from the Secretary of War to enter the service. *Meade v. Deputy Marshal* (C. C. 1815), Fed. Cas. No. 9,372.

Calling and service of militia.—The President alone is made the judge of the necessity of calling the militia into the service of the United States, and he acts upon his responsibility under the Constitution. *Martin v. Mott* (1827), 25 U. S. (12 Wheat. 19), 6 L. Ed. 537; *Vanderheyden v. Young* (N. Y. 1814), 11 Johns. 150. See also *Luther v. Borden* (1849), 7 How. 1, 12 L. Ed. 581; In re *Brockman* (Sup. Ct. D. C., 1917), 45 Wash. L. R. 133; (1856) 8 Op. Atty. Gen. 8.

The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel

invasions, or to execute the laws of the Union, and hence the President has no authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation. (1912) 29 Op. Atty. Gen. 822.

The power of the President under the Federal Constitution to call the whole militia of any part of the Union into service in case of invasion may be exercised by his delegate, i. e., a general commanding in chief in a particular district; and all citizens subject to militia duty may thereby be placed under military law, but this is the extent of martial law, and all beyond is usurpation. *Johnson v. Duncan* (La. 1815), 3 Mart. (O. S.) 530, 6 Am. Dec. 675.

The commanders in chief of the militia of the several States have a right to determine whether any of the exigencies contemplated by the Constitution of the United States exist, so as to require them to place the militia, or any part of it, in the service of the United States, at the request of the President, to be commanded by him, pursuant to acts of Congress. In re *Opinion of the Judges* (1812), 8 Mass. 540.

Under this clause the raising of militia by draft under order of the President and the punishment of delinquents refusing or neglecting to serve are matters of Federal cognizance. *Matter of Spangler* (1863), 11 Mich. 298.

Act of Feb. 28, 1795 (R. S. 1642), passed by virtue of this clause gave the President authority in case of invasion or danger of it to call forth the militia, which thereafter were subject to the same rules as the United States troops, and provided a penalty for failure of the militia to obey the President's orders. Held, thereunder, that on the President's calling on the State executives for militia pursuant to the express provisions of act of Apr. 18, 1812, whatever orders were given by the governor respecting the militia called for were given in pursuance of the President's call, and their breach was a breach of the President's orders. *Commonwealth v. Irish* (Pa. 1815), 3 Serg. & R. 177, note.

The authority under this clause to call forth the militia includes the power to punish delinquent militiamen who fall or refuse to respond. *Duffield v. Smith* (1818), 3 Serg. & R. (Pa.) 590, 593. See, also, *Mills v. Martin* (N. Y. 1821), 19 Johns. 7, as to amenability of militiamen to laws of United States in times of peace and when not in the service or pay of the United States.

Suppressing insurrection.—The authority of the United States to suppress the rebellion is found in the power to suppress

insurrection and carry on war. *Texas v. White* (1868), 7 Wall. 700, 727, 19 L. Ed. 227.

Authority to suppress rebellion is found in the power to suppress insurrection and carry on war; and authority to provide for the restoration of State governments, under the Constitution, when subverted and overthrown, is derived from the obligation of the United States to guarantee to every State in the Union a republican form of Government. The latter, indeed, in the case of a rebellion which involves the government of a State, and, for the time, excludes the national authority from its limits, seems to be a necessary complement to the other. *Texas v. White* (1868), 74 U. S. (7 Wall.) 700, 19 L. Ed. 227.

The authority to make war to suppress rebellion is derived from this clause, and the provision in art. 2, sec. 3, that the President shall take care that the laws be faithfully executed. *Norris v. Doniphan* (1863), 61 Ky. (4 Metc.) 385.

Act of Mar. 3, 1863, authorizing the raising of a national military force, to suppress an existing rebellion, by a draft, is not repugnant to this clause, by interfering with the reserved rights of the States over their own militia.

Act of government or officers of States in insurrection or rebellion.—Where the militia of a State are employed by the governor to resist the authority of the United States, they become public ene-

emies. The fact that the governor was lawfully elected and qualified, and that the militia were lawfully organized and called out, furnishes no excuse or claim for compensation to those who knowingly supplied them with the means of prosecuting hostilities, though a warrant on the Treasury was issued under the forms of law. *State ex rel. Blakeman v. Hays* (1872), 49 Mo. 604.

The acts of an officer, performed after the President of the United States has declared the county to be in insurrection and rebellion, are void. *Hawver v. Seldenridge* (1887), 2 W. Va. 274, 94 Am. Dec. 532.

Where a State government is in insurrection or rebellion and committing acts of hostility against the Government of the United States, and the same is so declared by the political department of the United States Government, the acts of all officers claiming allegiance to and adhering to the State government are null and void. *Id.*

Although a trespass is committed by order of the authorities of a State acting in pursuance of the law thereof, it can not be justified when the State is engaged in rebellion against the Government and laws of the United States. *Lively v. Ballard* (1868) 2 W. Va. 496.

Repelling invasion.—The power to repel invasion includes the power to provide against the danger of invasion. *Martin v. Mott* (1827), 12 Wheat, 19, 28, 6 L. Ed. 437.

2787. Troops to have the right of way.—That the United States forces or troops, or any portion of the militia, parading, or performing any duty according to law, shall have the right of way in any street or highway through which they may pass: *Provided*, That the carriage of the United States mails, the legitimate functions of the police, and the progress and operations of fire-engines and fire departments shall not be interfered with thereby. *Sec. 47, act of Mar. 1, 1889 (25 Stat. 779).*

Change the number of section forty-seven to "fifty." *Act of Feb. 18, 1909 (35 Stat. 634), amending sec. 47, act of Mar. 1, 1889 (25 Stat. 779).*

As the above appears in an act having relation to the National Guard of the District of Columbia it may be inferred that the streets, etc., mentioned are those of the said District.

2788. Presence of troops at polls.—Every officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, who orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held in any State, unless such force be necessary to repel armed enemies of the United States, shall be fined not more than five thousand dollars and imprisoned not more than five years. *Sec. 22, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1092).*

2789. Coercion of voters.—Every officer or other person in the military or naval service of the United States who, by force, threat, intimidation, order, advice, or otherwise, prevents, or attempts to prevent, any qualified voter of any

State from freely exercising the right of suffrage at any general or special election in such State shall be fined not more than five thousand dollars and imprisoned not more than five years. *Sec. 23, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1092).*

2790. Prescribing qualification of electors.—Every officer of the army or navy who prescribes or fixes, or attempts to prescribe or fix, whether by proclamation, order, or otherwise, the qualifications of voters at any election in any State shall be punished as provided in the preceding section. *Sec. 24, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1092).*

2791. Coercion of an election official.—Every officer or other person in the military or naval service of the United States who, by force, threat, intimidation, order, or otherwise, compels, or attempts to compel, any officer holding an election in any State to receive a vote from a person not legally qualified to vote; or who imposes, or attempts to impose, any regulations for conducting any general or special election in a State different from those prescribed by law, or who interferes in any manner with any officer of an election in the discharge of his duty, shall be punished as provided in section twenty-three. *Sec. 25, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1093).*

2792. Penalty for interference with elections.—Every person convicted of any offense defined in the four preceding sections shall, in addition to the punishment therein prescribed, be disqualified from holding any office of honor, profit, or trust under the United States; but nothing therein shall be construed to prevent any officer, soldier, sailor, or marine from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote. *Sec. 26, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1093).*

2793. Protection of civil rights.—It shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as may be necessary to aid in the execution of judicial process issued under any of the preceding provisions, or as shall be necessary to prevent the violation and enforce the due execution of the provisions of this Title. *R. S. 1989.*

Notes of Decisions.

Operation of statute.—*Sec. 2812, post, forbidding the employment of the army as a posse comitatus for the purpose of executing the laws, does not abridge the power*

to use any part of the land or naval forces, or militia, for the purposes set forth in this section. (1890) 19 Op. Atty. Gen. 570.

2794. Prevention of peonage.—The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void. *R. S. 1990.*

Every person in the military or civil service in the Territory of New Mexico shall aid in the enforcement of the preceding section. *R. S. 1991.*

Notes of Decisions.

Operation of statute.—Though the system of peonage in New Mexico was the moving cause for the enactment of this section, and its title and the Senate debates showing that to be the fact, the act does more than merely abolish an existing system, and makes criminal certain acts which would tend to sustain or reestablish such a system; R. S. 5526 providing for the punishment of any person who holds, arrests, returns, or causes to be returned, any person "to a condition of peonage." In re Lewis (C. C. 1902), 114 Fed. 963.

Validity.—This section is a valid exercise of power granted to Congress by Const. U. S. Amend. 13. *Clyatt v. U. S.* (1905), 25 Sup. Ct. 429, 430, 197 U. S. 207, 49 L. Ed. 726; *U. S. v. McClellan* (D. C. 1904), 127 Fed. 971, 973, 979.

"Peonage" defined.—Peonage is a status or condition of compulsory service based on the indebtedness of the peon to the master.

Clyatt v. U. S. (1905), 25 Sup. Ct. 429, 430, 197 U. S. 207, 49 L. Ed. 726; [C. S. p. 4809].

Peonage, within the meaning of this section, is the holding of any person to service or labor to pay a debt due from the laborer to the employer, when such employee desires to leave the employment before his debt is paid off; and it is immaterial whether the contract of employment was voluntarily made by the laborer or not, and whether it was made for a present or pre-existing consideration. *Peonage Cases* (D. C. 1905), 136 Fed. 707, 708.

Violation of statute—What constitutes.—The holding of another in a state of peonage, whether sanctioned or not by municipal or State law, is included in the prohibition in this section against peonage in any State or Territory. *Clyatt v. U. S.* (1905), 25 Sup. Ct. 429, 431, 197 U. S. 207, 49 L. Ed. 726.

2795. Protection of Yellowstone National Park.—The Secretary of War, upon the request of the Secretary of the Interior, is hereby authorized and directed to make the necessary details of troops to prevent trespassers or intruders from entering the park for the purpose of destroying the game or objects of curiosity therein, or for any other purpose prohibited by law, and to remove such persons from the park if found therein. *Act of Mar. 3, 1883* (22 Stat. 627).

This provision was not repealed by act of May 7, 1894, by express provision of sec. 10 of that act (28 Stat. 75).

2796. Protection of national parks in California.—The Secretary of War, upon the request of the Secretary of the Interior, is hereafter authorized and directed to make the necessary detail of troops to prevent trespassers or intruders from entering the Sequoia National Park, the Yosemite National Park, and the General Grant National Park, respectively, in California, for the purpose of destroying the game or objects of curiosity therein, or for any other purpose prohibited by law or regulation for the government of said reservations, and to remove such persons from said parks if found therein. *Act of June 6, 1900* (31 Stat. 618).

2797. Protection of the rights of a discoverer.—The President is authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of the discoverer or of his widow, heir, executor, administrator, or assigns. R. S. 5577.

2798. Military forces employed to enforce laws concerning Indians.—The military forces of the United States may be employed in such manner and under such regulations as the President may direct—

First. In the apprehension of every person who may be in the Indian country in violation of law; and in conveying him immediately from the Indian country, by the nearest convenient and safe route, to the civil authority of the Territory or judicial district in which such person shall be found, to be proceeded against in due course of law;

Second. In the examination and seizure of stores, packages, and boats, authorized by law;

Third. In preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law;

Fourth. And also in destroying and breaking up any distillery for manufacturing ardent spirits set up or continued within the Indian country. *R. S. 2150.*

Notes of Decisions.

Employment and authority of military force.—The Army is the proper force to employ when intruders and trespassers who go on the reservation are to be ejected therefrom. *U. S. v. Crook (C. C. 1879), Fed. Cas. No. 14,891.*

The Territory of Alaska, under act of Mar. 3, 1873, became, as to the introduction of liquors, "Indian country," and the military force of the United States may be employed for the arrest of persons violating the Indian intercourse act of 1834. *In re Carr (D. C. 1875), Fed. Cas. No. 2,432.*

The military power may be employed to effect the removal of a person from an Indian reservation in a proper case, but the person thus removed can not be held by the military authorities. *U. S. v. Crook (C. C. 1879), Fed. Cas. No. 14,891.*

Where certain persons claiming to belong to the Cherokee Nation attempted to settle on certain lands, their removal therefrom by the military authorities held justifiable. (1880) 16 Op. Atty. Gen. 470. See *Waters v. Campbell (C. C. 1877), Fed. Cas. No. 17,265*, holding that a person arrested by military force may be confined in the military prison, but he can not be lawfully required to labor or perform any duty other than taking care of his person.

The President may, under section 2819, post, direct the military forces to render the marshal such aid as may be necessary to enable him to maintain the peace and enforce the laws of the United States in that Territory. (1889) 19 Op. Atty. Gen. 293.

Persons apprehended by the military for unlawful traffic with Indians, and also property taken with them, should be placed in the custody of the marshal, whereupon the United States attorney should institute proceedings for the penalty and forfeiture of the property. Where the persons have also violated articles of war, they may be tried by and punished by court-martial, or turned over to the civil authorities to be proceeded against. (1871) 13 Op. Atty. Gen. 470.

The troops of the United States can not be employed in the Indian Territory for the purpose of assisting in the preservation of the peace and the arrest of bandits and outlaws unless they are trespassing upon Indian country, or abetting offenders within the provisions of sec. 2152 of the Revised Statutes. 21 Op. Atty. Gen. 72.

Whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians for actual wrongs committed in time of peace under orders emanating from a source which is itself without authority in the premises. Hence a military officer seizing liquors supposed to be in Indian country when they are not is liable to an action as a trespasser. *Bates v. Clark, 95 U. S. 204.*

Officers of the Army making arrests under sec. 23 of the act of June 30, 1834 (4 Stat. 732; *R. S. 2150*), act as officers of civil law. To justify such arrests there must be strong probable cause. *In re Carr, 3 Sawyer, 316.*

2799. Limit of detention in the Indian country.—No person apprehended by military force under the preceding section shall be detained longer than five days after arrest and before removal. All officers and soldiers who may have any such person in custody shall treat him with all the humanity which the circumstances will permit. *R. S. 2151.*

Notes of Decisions.

Detention of persons arrested by military force.—A person arrested by military force is not a military prisoner, subject to the articles of war, but a citizen charged with a nonmilitary crime, and

must be removed for trial by the civil authorities within five days from his arrest or discharge, and his detention thereafter under any circumstances is unlawful. *Waters v. Campbell (C. C. 1877), Fed. Cas.*

No. 17,265; *In re Carr* (D. C. 1875), Fed. Cas. No. 2,432.

The Military Department has no authority to hold a person apprehended for

being unlawfully in the country indefinitely as a prisoner, nor to destroy property so found. *U. S. v. Crook* (D. C. 1875), 179 Fed. 391.

2300. Arrest of Indians.—The superintendents, agents, and sub-agents shall endeavor to procure the arrest and trial of all Indians accused of committing any crime, offense, or misdemeanor, and of all other persons who may have committed crimes or offenses within any State or Territory, and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize. The President may direct the military force of the United States to be employed in the apprehension of such Indians, and also in preventing or terminating hostilities between any of the Indian tribes. *R. S. 2152.*

The word "superintendents" has become inoperative, no appropriations for such superintendents having been made since 1877 (19 Stat. 271).

Notes of Decisions.

Employment and authority of military force.—The troops of the United States can not be employed in the Indian Territory for the purpose of assisting in the preservation of peace and the arrest of bandits and outlaws unless they are trespassing on Indian country, or absconding offenders within this section. (1894) 21 Op. Atty. Gen. 72.

A military officer, unless he be an Indian agent, or be called on to act by such agent, has no power to arrest fugitives from justice in a State who have escaped into the Indian Territory. Such persons may be removed from the territory as intruders, and surrendered to the State authorities, by the proper Indian agent. (1877) 15 Op. Atty. Gen. 601.

2301. Live stock of restricted Indians.—That where restricted Indians are in possession or control of live stock purchased for or issued to them by the Government, or the increase therefrom, such stock shall not be sold, transferred, mortgaged, or otherwise disposed of, except with the consent in writing of the superintendent or other officer in charge of the tribe to which the owner or possessor of the live stock belongs, and all transactions in violation of this provision shall be void. All such live stock so purchased or issued and the increase therefrom belonging to restricted Indians and grazed in the Indian country shall be branded with the I D or reservation brand of the jurisdiction to which the owners of such stock belong, and shall not be removed from the Indian country except with the consent in writing of the superintendent or other officer in charge of the tribe to which the owner or possessor of such live stock belongs, or by order of the Secretary of War, in connection with the movement of troops. Every person who violates the provisions of this section by selling or otherwise disposing of such stock, purchasing, or otherwise acquiring an interest therein, or by removing such stock from the Indian country, shall be fined in any sum not more than \$1,000, or imprisoned for not more than six months, or both such fine and imprisonment. *R. S. 2138, as amended by act of June 30, 1919 (41 Stat. 9).*

As originally enacted, R. S. 2138 was as follows:

"Every person who drives or removes, except by authority of an order lawfully issued by the Secretary of War, connected with the movement or subsistence of troops, any cattle, horses, or other stock from the Indian country for the purposes of trade or commerce, shall be punishable by imprisonment for not more than three years, or by a fine of not more than five thousand dollars, or both."

2302. Sale of live stock of Indians.—The agent of each tribe of Indians, lawfully residing in the Indian country, is authorized to sell for the benefit of such

Indians any cattle, horses, or other live stock belonging to the Indians, and not required for their use and subsistence, under such regulations as shall be established by the Secretary of the Interior. But no such sale shall be made so as to interfere with the execution of any order lawfully issued by the Secretary of War, connected with the movement or subsistence of troops. *R. S. 2127.*

Sale of Government purchased cattle by Indians, except to members of their own tribe, is prohibited, unless the agent's written consent be obtained, by act of July 4, 1884 (23 Stat. 94).

Notes of Decisions.

Construction and applicability in general.—This section is not limited to cattle in possession of Indians at the time of its enactment, and the section is broad enough to cover the increase of such cattle as the Government may furnish. *Rider v. La Clair* (1914), 138 Pac. 3, 77 Wash. 488.

Under this section and act of July 4, 1884 (23 Stat. 94), mortgage on cattle received by Indian from United States Government, and in his possession on his allotment of land, made without the sanction of the Indian agent, is void. *Id.*

Indian country.—The term "Indian country" contained in sec. 1, of the act of June 30, 1834 (4 Stat. 79), though not incorporated in the Revised Statutes, and though repealed simultaneously with their enactment, may be referred to in order to determine what is meant by the term when used in statutes; and it applies to all the country to which the Indian title has not been extinguished within the limits of the United States, whether within a reservation or not, and whether acquired before or since the passage of that act. *Ex parte Crow Dog*, 109 U. S. 556; *Bates v. Clark*, 95 U. S. 204. See also, as to the status of the Indian Territory, *Cook v. U. S.*, 138 U. S. 157.

The term "Indian country," as employed in the statutes regulating trade and intercourse with the Indians (see, particularly, chap. 4, title 28, R. S.), might properly be defined in general as including the following territory, viz: Indian reservations occupied by Indian tribes; other districts so occupied to which the Indian title has not been extinguished; any districts not in other respects Indian country over which

the operation of those statutes may be extended by treaty or act of Congress. See G. O. 97, Headquarters of Army, 1871; also in the same connection, 14 Op. Atty. Gen. 290; *U. S. v. Forty-three Gallons of Whisky*, 8 Otto, 188; *Bates v. Clark*, 5 id. 204; *U. S. v. Seveloff*, 2 Sawyer, 311.

In view of the act of Mar. 3, 1873, extending to it certain provisions of the act of June 30, 1834, the Territory of Alaska is "Indian country," so far as concerns the introduction and disposition of spirituous liquor, and persons violating such provisions may therefore be arrested by military force. See *In re Carr*, 3 Sawyer, 316; 14 Op. Atty. Gen. 327; *Patchen v. U. S.*, 11 Fed. Rep. 47; *U. S. v. Forty-three Cases of Cognac Brandy*, 14 id. 539.

A valid location under act of July 1, 1898, authorizing entry of mineral lands in the Colville Indian Reservation, in Washington, segregates the claim from the reservation and extinguishes the Indian title thereto, which is merely possessory, and the land embraced in such location ceases to be Indian country. *U. S. v. Four Bottles Sour-Mash Whisky* (D. C. 1898), 90 Fed. 720, 723. See (1889) 19 Op. Atty. Gen. 306.

"Indian country" is only that portion of the United States which has been declared to be such by act of Congress. *U. S. v. Seveloff* (D. C. 1872), Fed. Cas. No. 16,252.

"Indian country" includes allotments, so long as the legal title is in the United States, and so long as there are restrictions on alienation. *U. S. v. Twelve Bottles of Whisky* (D. C. 1912), 201 Fed. 191.

2803. Prohibition of intoxicants in the Indian country.—No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barter, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense. But it shall be a suf-

sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. All complaints for the arrest of any person or persons made for violation of any of the provisions of this act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, and, if in the Indian Territory, before the United States court commissioner, or commissioner of the circuit court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the State in which such reservation is located to issue warrants for the arrest and examination of offenders by section ten hundred and fourteen of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense. *R. S. 2139, amended by act of July 23, 1892 (27 Stat. 260).*

See notes to 2804, post.

2804. Prohibition of intoxicants for Indians.—That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquors, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided however*, That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department. *Sec. 1, act of Jan. 30, 1897 (29 Stat. 506).*

That so much of the Act of the twenty-third day of July, eighteen hundred and ninety-two, as is inconsistent with the provisions of this Act is hereby repealed. *Sec. 2, act of Jan. 30, 1897 (29 Stat. 506).*

This section has been held to be an amendment of act of July 23, 1892, amendatory of R. S. 2139, ante, 2803 (see 224 Fed. 698), and also that the maximum penalty provision of said section was not inconsistent with the penalty provision of this section.

Notes of Decisions.

Power of Congress in general.—The police power of the United States can only be exercised where the legislative authority of Congress excludes territorially all State legislation, and where the United States has conveyed under its land laws lands within a State ceded to it by an Indian tribe, and such lands have passed into the ownership of individuals and a municipality of the State which has been formed thereon, they are no longer subject to R. S. 2139, ante, 2803, as amended by this section. *Ex parte Dick* (1905), 141 Fed. 5, 72 C. C. A. 667; order reversed *Whitney v. Dick* (1906), 26 Sup. Ct. 584, 202 U. S. 182, 50 L. Ed. 943.

This section is not a revenue statute but a police regulation. In *re Heff* (1905), 25 Sup. Ct. 506, 197 U. S. 488, 49 L. Ed. 848; *U. S. v. Boss* (D. C. 1906), 160 Fed. 182.

Application of act.—This section embraces Indian country within the limits of a State. *Hallowell v. U. S.* (1911), 81 Sup. Ct. 587, 221 U. S. 317, 55 L. Ed. 750; *U. S. v. Wright* (1913), 33 Sup. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160; *Pronovost v. U. S.* (1914), 34 Sup. Ct. 391, 232 U. S. 487, 58 L. Ed. 696.

Construction and operation of statute in general.—The terms of this section show that it was specially designed to provide for the changes consequent on the adoption of the policy of allotting the Indian lands in severalty. *U. S. v. Wright* (1913), 33 Sup. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160.

Effect of other legislation or State constitutions.—Prohibition against introduction and sale of liquors in Indian country made

by act of July 23, 1892, amendatory of R. S. 2139, was not superseded in the Indian Territory by sections 8, 13, act of March 1, 1895. *U. S. v. Wright* (1913), 33 S. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160. Prohibition made by R. S. 2139, as amended, were not superseded as to transactions within the State by admission of Oklahoma into the Union under enabling act of June 16, 1906. *U. S. v. Wright* (1913), 33 Sup. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160; *Mosler v. U. S.* (1912), 198 Fed. 54, 117 C. C. A. 162.

Indians as offenders.—The statute prohibits the furnishing of intoxicating liquors by one Indian to another Indian. *U. S. v. Sutton* (1909), 30 Sup. Ct. 116, 215 U. S. 291, 54 L. Ed. 200, and cases cited; *Same v. Shaw-Mux* (D. C. 1873), Fed. Cas. No. 16,268; *U. S. v. Miller* (D. C. 1901), 105 Fed. 944, 948.

A sale of spirituous liquor to an Indian under the charge of an Indian superintendent or agent, though not made within the Indian country, is an offense. *U. S. v. Burdick* (1875), 1 Dak. 142, 46 N. W. 571.

Indian soldiers.—An Indian of the Nez Perce tribe, a soldier in the United States Army, is within R. S. 2139. *U. S. v. Hurshman* (D. C. 1892), 53 Fed. 543.

Students at Carlisle School.—This section extends to Indian students at the Carlisle School, which is maintained at the expense of the Government under the direction of the Interior Department. *U. S. v. Belt* (D. C. 1904), 128 Fed. 168.

"Indian country."—See notes to 2802, ante.

2805. Intoxicants furnished to Indians by soldiers, etc.— * * * And no part of section twenty-one hundred and thirty-nine or of section twenty-one hundred and forty of the Revised Statutes shall be a bar to the prosecution of any officer, soldier, sutler or storekeeper, attaché, or employee of the Army of the United States who shall barter, donate, or furnish in any manner whatsoever liquors, wines, beer, or any intoxicating beverage whatsoever to any Indian. *Act of July 4, 1884* (23 Stat. 94).

For R. S. 2139, 2140, mentioned above, see 2803, ante, 2807, post.

Notes of Decisions.

Operation of statute in general.—This section is not a legislative construction of

R. S. 2139. In *re McDonough* (D. C. 1892), 49 Fed. 360.

2806. Sacramental wines introduced into the Indian country.— * * * *Provided*, That hereafter it shall not be unlawful to introduce and use wines solely for sacramental purposes, under church authority, at any place within the Indian country or any Indian reservation, including the Pueblo Reservations in New Mexico: *Provided also*, That the powers conferred by section seven hundred and eighty-eight of the Revised Statutes upon marshals and their deputies are hereby conferred upon the chief special officer for the suppression of the liquor

traffic among Indians and duly authorized officers working under his supervision whose appointments are made or affirmed by the Commissioner of Indian Affairs or the Secretary of the Interior. *Act of Aug. 24, 1912 (37 Stat. 519).*

2807. Search for concealed liquors in the Indian country.—If any superintendent of Indian affairs, Indian agent, or subagent, or commanding officer of any military post has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country in violation of law, such superintendent, agent, subagent, or commanding officer may cause the boats, stores, packages, wagons, sleds, and places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informer and the other half to the use of the United States; and if such person be a trader his license shall be revoked and his bond put in suit. It shall, moreover be the duty of any person in the service of the United States or of any Indian to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department. In all cases arising under this and the preceding section Indians shall be competent witnesses. *R. S. 2140.*

Act of July 28, 1892, by its title purported to amend this section and *R. S. 2141*, besides *R. S. 2139*, but its provisions amended *R. S. 2139* only.

The words of this section, "superintendent of Indian affairs," have become inoperative; no appropriations for such superintendents having been made since 1877 (19 Stat. 271).

Notes of Decisions.

Construction in general.—This section is highly penal, and is not in aid of the revenue, and it must be strictly construed, doubts resolved in favor of those against whom it is invoked, no person or case held within it unless clearly within its letter, and all not to defeat, but to effectuate, the legislative intent. *U. S. v. Two Gallons of Whisky (D. C. 1914)*, 213 Fed. 986.

"Indian country."—See notes to 2802, ante.

Indian country as place of search and seizure.—Searches and seizures are limited to searches and seizures in the Indian country. *Bates v. Clark (1877)*, 95 U. S. 204, 24 L. Ed. 471; *Evans v. Victor (1913)*, 204 Fed. 361, 122 C. C. A. 531, and cases cited.

Necessity of search warrants.—No special officer of the Indian service, no Indian sup-

erintendent, agent or subagent, or deputy, has authority, without a search warrant, to search lands, stores, houses, or other improvements, owned or occupied by citizens of the United States. *Evans v. Victor (1913)*, 204 Fed. 361, 122 C. C. A. 531, reversing order (D. C. 1912) 199 Fed. 504.

Persons against whom search and seizure may be had.—A seizure is authorized only as against a white person or Indian. *Webb v. Nickerson (1884)*, 11 Or. 382, 4 Pac. 1126.

Property subject to search and seizure.—A stock of liquors transported across a reservation to a place where it may be lawfully sold is not subject to seizure while in transit, or after it reaches its destination. *U. S. v. Four Bottles Sour-Mash Whisky (D. C. 1898)*, 90 Fed. 720, 723.

2808. Distilleries in the Indian country.—Every person who shall, within the Indian country, set up or continue any distillery for manufacturing ardent spirits, shall be liable to a penalty of one thousand dollars; and the superintendent of Indian Affairs, Indian agent, or subagent, within the limits of whose agency any distillery of ardent spirits is set up or continued, shall forthwith destroy and break up the same. *R. S. 2141.*

The words of this section, "superintendent of Indian affairs," have become inoperative, no appropriations for such superintendents having been made since 1877 (19 Stat. 271).

Notes of Decisions.

Establishment of distillery in Indian Territory as offense.—Establishment of distillery in the Indian Territory on lands wherein the Indian title is said to be extinct would be in contravention of this section, and also of sec. 8, act of Mar. 1, 1895 (28 Stat. 607), which applies specially to

the Indian Territory; for there is no portion of the Indian Territory wherein the Indian title has become extinct to the extent that it has ceased to be Indian country, or where this prohibition does not apply. (1898), 22 Op. Att. Gen. 232.

2809. Possession of intoxicants.— * * * The provisions of sections twenty-one hundred and forty and twenty-one hundred and forty-one of the Revised Statutes of the United States shall also apply to beer and other intoxicating liquors named in the Act of January thirtieth, eighteen hundred and ninety-seven (Twenty-ninth Statutes at Large, page five hundred and six), and the possession by a person of intoxicating liquors in the country where the introduction is prohibited by treaty or Federal statute shall be *prima facie* evidence of unlawful introduction. *Sec. 1, act of May 18, 1916 (39 Stat. 124).*

2810. Removal of persons from the Indian country.—The superintendent of Indian affairs, and the Indian agents and subagents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President is authorized to direct the military force to be employed in such removal. *R. S. 2147.*

The words of this section, "superintendent of Indian affairs, and the," have become inoperative; no appropriations for such superintendents having been made since 1877 (19 Stat. 271).

See also 2798, *ante*.

Notes of Decisions.

Use and authority of military force.—This section and 2798 *ante*, and *R. S. 2143, 2149*, confer the right to use the military forces of the United States in ejecting trespassers upon Indian lands, and the grant of this power carries with it the duty of its exercise. (1891) 20 Op. Att. Gen. 245; (1900), 23 Op. Att. Gen. 214.

An order directing the employment of the military in the removal from Indian country of persons found therein contrary to law need not be issued by the President by his own hand, but it is sufficient if issued by the Secretary of War. (1874) 14 Op. Att. Gen. 451.

2811. Removal of settlers on Indian lands.—Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of one thousand dollars. The President may, moreover, take such measures and employ such military force as may judge necessary to remove any such person from the lands. *R. S. 2118.*

The word "he" is obviously omitted in next to the last line. It appears in the act of June 30, 1834 (4 Stat. 730), from which *R. S. 2118* was taken.

Notes of Decisions.

Prohibited settlements or occupations.—A settlement on lands of Pueblo Indians in New Mexico is not within this statute or of sec. 7, act of July 27, 1851, extending laws regulating trade and intercourse with Indian tribes over the Indian tribes in the Terri-

tory of New Mexico. *U. S. v. Joseph* (1876), 94 U. S. 614, 615, 24 L. Ed. 295; *Same v. Santistevan* (1874), 1 N. M. 583.

This section did not prohibit settlement on lands in the Indian country outside of any reservation, and in which the only

Indian right was the original right of occupancy at the will of the Government. *Caldwell v. Robinson* (C. C. 1894), 59 Fed. 653, decree affirmed *Robinson v. Caldwell* (1895), 67 Fed. 391, 14 C. C. A. 448.

An occupation of Indian lands for grazing purposes only, with the consent of the Indians and in recognition of their title, is not forbidden. *U. S. v. Hunter* (D. C. 1885), 4 Mackey, 531. As this section was intended to prevent white men from settling Indian lands, and as the provision of sec. 16, of the Curtis Act of June 28, 1898 (30 Stat. 501), in regard to laying off towns applies only to the laying off and incorporation of a legal subdivision, a Chickasaw Indian in possession of his prospective allotment has a right to lay out a town and rent lots on such allotment, no political or legal subdivision being created. *U. S. v. Lewis* (1903), 76 S. W. 290, 5 Ind. T. 1.

This section does not prohibit settlement on lands in the Indian country, except those belonging, secured, or granted by treaty to

any Indian tribe. *McCracken v. Todd* (1862), 1 Kan. 148.

Law governing settlers on Indian reservations.—Settlers on Indian reservations are subject to the same laws governing the possession and right to the possession of property as settlers on the public domain, where it appears that they occupy lands as homes within such reservation by sufferance only. *Francis v. Green* (1901), 65 P. 362, 7 Idaho, 668.

Protection of Indians in use and occupancy.—One held an intruder, and may be summarily removed. (1875) 14 Op. Atty. Gen. 568; (1882) 17 Op. Atty. Gen. 306.

The Commissioner of Indian Affairs and his subordinate, the Indian agent, have full discretion to remove from the Puyallup Indian Reservation, Wash., any person not of the tribe of Indians entitled to remain there, and in so doing may, by direction of the President, use any military force necessary for the purpose. (1891), 20 Op. Atty. Gen. 245.

2812. Restriction upon the use of troops to enforce laws.—From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; * * * and any person wilfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment. *Sec. 15, act of June 18, 1878* (20 Stat. 152).

A provision of this section, that no money appropriated by the act should be used to pay any expenses incurred in the employment of any troops in violation of the section, is omitted here, as temporary merely.

Notes of Decisions.

Use of troops.—The provisions of this section do not abridge the power to use any part of the land or naval forces, or militia, for the purposes set forth in 2793, ante, relating to the enforcement of civil rights. (1890) 19 Op. Atty. Gen. 570.

Troops of the United States can not, without violating this section, be employed as a posse comitatus, to aid the United States marshal or his deputies in arresting certain persons in the State of Kentucky charged with robbing an officer of the Government. (1881) 17 Op. Atty. Gen. 71. Nor can they be employed in the Indian Territory to aid in the preservation of peace and the arrest of alleged "outlaws" and "bandits," unless such persons are illegally intruding or attempting to intrude upon the Indian country, or are absconding

offenders within the provisions of 2800, ante. (1894) 21 Op. Atty. Gen. 72. Nor can they be used for the suppression of unlawful organizations, unless the state of facts be such as to enable them to be used under the provisions of 2810, 2821, post. (1878) 16 Op. Atty. Gen. 162; (1881) 17 Op. Atty. Gen. 242.

The President may, however, under 2819, post, direct the military forces to render the marshal for the Indian Territory such aid as may be necessary to enable him to maintain the peace and enforce the laws of the United States in that Territory; but the marshal can not himself call on the troops for such aid. (1899) 19 Op. Atty. Gen. 293. And as to the exercise of such power in regard to Alaska, see (1899) 19 Op. Atty. Gen. 368.

2813. Protection of States by Federal troops.—The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature can not be convened), against Domestic Violence. *Art. IV, sec. 4, Constitution of the United States.*

Notes of Decisions.

Nature and status of States.—The term "State" is used to express the idea of a people or political community as distinguished from the Government. In this sense it is used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion. *Texas v. White* (1868), 74 U. S. (7 Wall.) 700, 19 L. Ed. 227.

As used in this section the word "State" is used to indicate a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the Government. A plain distinction is made between a State and the government of a State. *Id.*

Protection from invasion or domestic violence.—Though a State can not establish a permanent military government, yet it may use its military power to put down an insurrection. The State must determine for itself what degree of force the crisis demands. *Luther v. Borden* (1849), 7 How. 1, 45, 12 L. Ed. 581.

So long as the war continued, it can not be denied that the President might institute temporary government within insurgent districts, occupied by the national forces or take provisional measures in any State for the restoration of State government faithful to the Union, employing, however, in such efforts only such means and agents as were authorized by constitutional laws. But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress, though necessarily limited to cases where the rightful Government is subverted by revolutionary violence, or in imminent danger of

being overthrown by an opposing government, set up by force within the State. *Texas v. White* (1868), 74 U. S. (7 Wall.) 700, 19 L. Ed. 227.

Authority to suppress rebellion is found in the power to suppress insurrection and carry on war; and authority to provide for the restoration of State governments, under the Constitution, when subverted and overthrown, is derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time, excludes the national authority from its limits, seems to be a necessary complement to the other. *Id.*

When a State can not protect itself against domestic violence, the other States may, upon the call of the executive when the legislature can not be convened, lend their assistance for that purpose. *U. S. v. Cruikshank* (1875), 92 U. S. 542, 23 L. Ed. 588.

Consideration of the circumstances in which the President may employ the military and naval force of the Union to suppress insurrection in one of the States. (1856) 8 Op. Atty. Gen. 8.

Where calls are made upon the President, by two persons, each claiming to be governor of the same State, to protect the State against domestic violence, it of necessity devolves upon the President to determine, before giving the required aid, which of such persons is the lawful incumbent of the office. Accordingly, on application for executive aid to suppress an insurrection in Arkansas, advised that Elisha Baxter be recognized by the President as the lawful governor of the State. (1874) 14 Op. Atty. Gen. 391.

2814. Suppression of insurrection against a State.—In case of an insurrection in any State, against the government thereof, it shall be lawful for the President, on application of the legislature of such State, or of the executive, when the legislature can not be convened, to call forth such number of the militia of any other State or States, which may be applied for, as he deems sufficient to suppress such insurrection; or, on like application, to employ, for the same purpose, such part of the land or naval forces of the United States as he deems necessary. *R. S. 5297.*

Notes of Decisions.

Military power subordinate.—Under this act the President may employ the militia and the land and naval forces for the purpose of causing the laws to be duly executed; but when a military force is called into the field for that purpose, its operations must be purely defensive, and the military power on such an occasion must be kept in strict subordination to the civil authority. (1800) 9 Op. Atty. Gen. 517.

2815. Enforcement of law in Alaska.—An Act entitled "An Act to define and punish crimes in the District of Alaska, and to provide a code of criminal procedure for the District," approved March third, eighteen hundred and ninety-nine, be, and is, amended, by adding to section three hundred and sixty-three thereof the following: "*Provided*, section fifteen of an Act entitled 'An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, eighteen hundred and seventy-nine, and for other purposes,' approved June eighteenth, eighteen hundred and seventy-eight, shall not be construed to apply to the District of Alaska": * * * *Sec. 23, act of June 6, 1900 (31 Stat. 330), amending sec. 363, act of March 3, 1899 (30 Stat. 1325).*

For sec. 15, mentioned in this section, see 2812, ante.

2816. Enforcement of law in the Hawaiian Islands.—That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known. *Sec. 67, act of Apr. 30, 1900 (31 Stat. 153).*

2817. Military control of the Canal Zone in time of war.—That in time of war in which the United States shall be engaged, or when, in the opinion of the President, war is imminent, such officer of the Army as the President may designate shall, upon the order of the President, assume and have exclusive authority and jurisdiction over the operation of the Panama Canal and all of its adjuncts, appendants, and appurtenances, including the entire control and government of the Canal Zone, and during a continuance of such condition the governor of the Panama Canal shall, in all respects and particulars as to the operation of such Panama Canal, and all duties, matters, and transactions affecting the Canal Zone, be subject to the order and direction of such officer of the Army. *Sec. 13, act of Aug. 24, 1912 (37 Stat. 569).*

2818. Philippine Scouts assisting constabulary officers.—That any companies of Philippine scouts ordered to assist the Philippine constabulary in the maintenance of order in the Philippine Islands may be placed under the command of officers serving as chief or assistant chiefs of the Philippine constabulary, as herein provided: *Provided*, That when the Philippine scouts shall be ordered to assist the Philippine constabulary, said scouts shall not at any time be placed under the command of inspectors or other officers of the constabulary below the grade of assistant chief of constabulary. *Sec. 2, act of Jan. 30, 1903 (32 Stat. 783).*

2819. Suppression of insurrection against the United States.—Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed. *R. S. 5298.*

Notes of Decisions.

See also notes to 2786, 2813, ante.

What constitutes insurrection.—An insurrection is a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in city or State. *In re Charge to Grand Jury* (D. C. 1894), 62 Fed. 828; *Spraff v. North Carolina Mut. Life Ins. Co.* (1853), 46 N. C. 126; *County of Allegheny v. Gibson* (1879), 90 Pa. 397, 35 Am. Rep. 670.

The open and active opposition of a number of persons to the execution of the laws of the United States, of so formidable a nature as to defy for the time being the authority of the Government, constitutes an insurrection, though not accompanied by bloodshed, and not of sufficient magnitude to render success probable. *In re Charge to Grand Jury* (D. C. 1894), 62 Fed. 828. See, also, *Presser v. Illinois* (1886), 6 Sup. Ct. 580, 585, 116 U. S. 252, 29 L. Ed. 615.

Use of military forces.—The military forces may, however, be used where an organized, armed, and fortified resistance to the execution of the law exists, by direction of the President, under the provisions of this section and 2821, post, should he deem proper to take certain preliminary steps therein provided and if resistance to the law shall thereafter continue. (1878) 16 Op. Atty. Gen. 162.

Nec. 2812, ante, renders unavailable the aid of the military forces of the United States for the suppression of unlawful organizations, unless the state of facts be such as to enable these forces to be used under the provisions of this section. (1881) 17 Op. Atty. Gen. 242.

Upon consideration of the facts stated: Advised that the military forces of the United States may be employed under this section, after proclamation as required by 2821, post, to aid in the execution of the laws and for the suppression of combinations of outlaws and criminals in the ter-

ritory of Arizona, without the need of further legislation. (1882) 17 Op. Atty. Gen. 333.

It is competent for the President, under this section, to direct the military forces to render the marshal for the Indian Territory, or for Alaska, such aid as may be necessary to enable him to maintain the peace and enforce the laws of the United States, but the marshal himself can not call on the troops for aid, their use as a posse comitatus being forbidden by 2812, ante. (1889) 19 Op. Atty. Gen. 293, 363.

The National Government has the right to use physical force in any part of the United States to compel obedience to its laws, and to carry into execution the powers conferred upon it by the Constitution. "We hold it to be an incontrovertible principle that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." *Ex parte Siebold*, 100 U. S. 371, 395; *U. S. v. Neagle*, 135 U. S. 1, 60; *Logan v. U. S.*, 144 U. S. 263, 294; *in re Walte*, 81 Fed. Rep. 359; *U. S. v. Deba*, 164 U. S. 724; *U. S. v. Cassidy*, 67 Fed. Rep. 698.

An officer who, in the performance of what he conceives to be his official duties, transcends his authority, and invades private rights, is answerable therefor to the Government under whose appointment he acts, and to individuals injured by his action; but where there is no criminal intent, he is not liable to answer the criminal process of another Government. *In re Lewis*, 83 Fed. Rep. 159; *in re Fair et al*, 100, id., 149.

An officer of the Army of the United States whilst serving in the enemy's country during the rebellion was not liable to an action in the courts of that country for injuries resulting from his military orders or acts; nor could he be required by a civil tribunal to justify or explain

them upon any allegation of the injured party that they were not justified by military necessity. He was subject to the laws of war, and amenable only to his own Government. *Dorr v. Johnson*, 100 U. S. 158; *Luther v. Borden*, 7 Howard 1, 46.

As a necessary incident of the power to declare and prosecute war, the Federal Government has a right to transport troops through and over the territory of any State of the Union. *Crandall v. Nevada*, 6 Wall. 35. See also 26 Op. Atty. Gen. 162; 27 id., 242, 333; 19 id., 293.

2820. General power to suppress insurrections, etc.—Whenever insurrection, domestic violence, unlawful combinations, or conspiracies in any State so obstructs or hinders the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by the laws for the protection of such rights, privileges, or immunities, and the constituted authorities of such State are unable to protect, or, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination or conspiracy, opposes or obstructs the laws of the United States, or the due execution thereof, or impedes or obstructs the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary, for the suppression of such insurrection, domestic violence, or combinations. *R. S. 5299.*

Notes of Decisions.

Insurrection.—Although no State could establish and maintain a permanent military government, yet it may use its military power to put down an armed insurrection too strong to be controlled by the civil au-

thority. The State must determine for itself what degree of force the crisis demands. *Luther v. Borden*, 7 How. 1. See also 16 Op. Atty. Gen. 162.

See also notes to 2786, 2813, 2819, ante.

2821. Proclamation to insurgents to disperse.—Whenever, in the judgment of the President, it becomes necessary to use the military forces under this Title, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes, within a limited time. *R. S. 5300.*

Notes of Decisions.

Essentials of proclamation.—A proclamation held to have taken effect when signed by the President and sealed. *Lapeyre v.*

U. S. (1872), 17 Wall. 101, 197, 21 L. Ed. 600.

2822. Suspension of commercial intercourse with a State in insurrection.—Whenever the President, in pursuance of the provisions of this Title, has called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when the insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which such combination exists, and such insurrection is not suppressed by such State or States, or whenever the inhabitants of any State or part thereof are at any time found by the President to be in insurrection against the United States, the President may, by proclamation, declare that the inhabitants of such State, or of any section or

part thereof where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from such State or section into the other parts of the United States, or proceeding from other parts of the United States to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States. *R. S. 5301.*

Notes of Decisions.

Construction of act.—This was not a temporary act, though passed during the late rebellion; nor on the cessation of hostilities did forfeitures which had been incurred, after proclamation, cease to be capable of enforcement. *The Reform* (1865), 3 Wall. 617, 629, 18 L. Ed. 105; *Winchester v. U. S.* (1878), 14 Ct. Cl. 43.

Whether the rebellion was suppressed, and when it was suppressed, are facts for the determination of the political branches of the Government, and the judiciary are concluded by their action in the premises. The President by virtue of the acts of July 13, 1861 (12 Stat. 257), July 31, 1861 (12 Stat. 284), and sec. 2, June 7, 1862 (12 Stat. 422), had the right to declare from time to time what States or parts of States were in insurrection against the United States. This power necessarily carried with it the right to decide and declare that the rebellion had been suppressed in any State or part of a State where it had before existed. *Grossmeyer v. U. S.* (1868), 4 Ct. Cl. 1.

The statutes and proclamations authorizing and prohibiting commercial intercourse with and in the insurrectionary districts during the rebellion examined and reviewed. *Walker's Ex'rs v. U. S.* (1876), 12 Ct. Cl. 408.

One effect of the nonintercourse act was to postpone and determine the time when commercial intercourse between the loyal and insurrectionary States should become unlawful. *Chesapeake & O. R. Co. v. U. S.* (1885), 20 Ct. Cl. 49.

Territory and persons affected.—The rule that war makes all citizens or subjects of one belligerent enemies of all citizens and subjects of the other applies to civil war. *The Venice* (1864), 2 Wall. 258, 17 L. Ed. 866; *Small's Adm'r v. Lumpkin's Ex'r* (1877), 28 Gratt. (Va.) 832.

Where States have assumed to secede and the functions of the Federal courts are suspended in rebellious territory, the United States Government is entitled to exercise belligerent rights against the seceded terri-

tory. *U. S. v. The F. W. Johnson* (D. C. 1861), Fed. Cas. No. 15,179; *Green's Case* (1874) 10 Ct. Cl. 466, 470.

An inhabitant of a loyal State held not to have acquired a domicile in the insurrectionary States, and hence his purchases there constituted trading with the enemy. *Mitchell v. U. S.* (1874), 21 Wall. 350, 352, 22 L. Ed. 584.

A citizen temporarily residing in the enemy's country is entitled to a reasonable time to collect his effects and convert them into available and manageable funds, to enable him to withdraw them from the country. *The John Gilpin* (C. C. 1863), Fed. Cas. No. 7,344.

In March, 1865, commercial intercourse between a citizen of a loyal State and a person residing in Savannah is unlawful, although Savannah is permanently occupied by United States forces; the acts and proclamations affecting commercial intercourse during the rebellion examined and construed. *Cutner v. U. S.* (1870), 6 Ct. Cl. 415.

A resident alien owes the same obedience to the law of the place in which he is, be it municipal or military, as a citizen; and when one, resident in New Orleans after its capture, transmits money across the lines to his agent, previously appointed, to buy cotton, it is commercial intercourse forbidden by both municipal and military law, and he acquires no valid title to the property purchased. *Queyrouze v. U. S.* (1871), 7 Ct. Cl. 402.

The status of a person in the Civil War was fixed by his residence, and business between persons in the warring sections became illegal. *Shacklett v. Polk* (1875), 51 Miss. 378.

The question of whether a locality was under the Federal or Confederate authority at a time during the war was not governed by the fact that at such time the State capital was held by a Federal military governor, but depends on actual occupation and dominion. *Bond v. Perkins* (1871), 51 Tenn. (4 Helsk.) 364.

2823. Suspension of commercial intercourse with part of a State.—Whenever any part of a State not declared to be in insurrection is under the control of insurgents, or is in dangerous proximity to places under their control, all commercial intercourse therein and therewith shall be subject to the prohibitions and conditions of the preceding section for such time and to such extent as shall become necessary to protect the public interests, and be directed by the Secretary of the Treasury, with the approval of the President. *R. S. 5302.*

2824. Persons prohibited from commercial intercourse during insurrection.—The provisions of this Title in relation to commercial intercourse shall apply to all commercial intercourse by and between persons residing or being within districts within the lines of national military occupation in the States or parts of States declared in insurrection, whether with each other or with persons residing or being within districts declared in insurrection and not within those lines; and all persons within the United States, not native or naturalized citizens thereof, shall be subject to the same prohibitions, in all commercial intercourse with inhabitants of States or parts of States declared in insurrection, as citizens of States not declared to be in insurrection. *R. S. 5303.*

Notes of Decisions.

Effect of statute.—A contract for the purchase of cotton, made during the Civil War by a subject of Norway, domiciled in New York, with a citizen of Texas, was

void. This section was only declaratory of a well-known principle of international law. *Habicht v. Alexander* (C. C. 1867), Fed. Cas. No. 5,896.

2825. Licenses to trade in insurrectionary States.—The President may, in his discretion, license and permit commercial intercourse with any part of such State or section, the inhabitants of which are so declared in a state of insurrection, so far as may be necessary to authorize supplying the necessities of loyal persons residing in insurrectionary States, within the lines of actual occupation by the military forces of the United States, as indicated by published order of the commanding general of the department or district so occupied; and, also, so far as may be necessary to authorize persons residing within such lines to bring or send to market in the loyal States any products which they shall have produced with their own labor or the labor of freedmen, or others employed and paid by them, pursuant to rules relating thereto, which may be established under proper authority. And no goods, wares, or merchandise shall be taken into a State declared in insurrection, or transported therein, except to and from such places and to such monthly amounts as shall have been previously agreed upon, in writing, by the commanding general of the department in which such places are situated, and an officer designated by the Secretary of the Treasury for that purpose. Such commercial intercourse shall be in such articles and for such time and by such persons as the President, in his discretion, may think most conducive to the public interest; and, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury. *R. S. 5304.*

Notes of Decisions.

Authority to issue license.—Power to license trading with enemy defined. *McKee v. U. S.* (1868), 8 Wall. 163, 166, 19 L. Ed. 829; *U. S. v. Lane* (1868), 8 Wall. 186, 195, 19 L. Ed. 445; *Sucht v. Dwight* (1876), 120 Mass. 9.

Under this provision, which gave the President power in his discretion to license intercourse, no one else could give licenses. *The Reform* (1865), 3 Wall. 617, 18 L. Ed. 105, affirming *The Sea Lion* (1865), id. 642; *The Sea Lion* (1866), 5 Wall. 630, 646, 18

L. Ed. 618; *Hall v. Coppel* (1868), 7 Wall. 542, 554, 19 L. Ed. 244; *Withenburg v. U. S.* (1867), 6 Wall. 521, 531, 18 L. Ed. 935.

Form and effect of license.—Permits granted during the rebellion by the proper licensing officers to purchase goods in a locality occupied by the Federal troops are *prima facie* evidence that the locality is properly within the trade regulations. *U. S. v. Weed* (1866), 5 Wall. 62, 72, 18 L. Ed. 531.

Military occupation.—Substantial, complete, and permanent military occupation and control, as distinguished from one that is illusory, imperfect, and transitory, works the exception in the act, and such military occupation draws after it the full measure of protection to persons and property consistent with a necessary subjection to military government. *The Venice* (1864), 2 Wall. 258, 277, 17 L. Ed. 866.

2826. Unlicensed trading in an insurrectionary State.—Every officer of the United States, civil, military, or naval, and every sutler, soldier, marine, or other person, who takes, or causes to be taken into a State declared to be in insurrection, or to any other point to be thence taken into such State, or who transports or sells, or otherwise disposes of therein, any goods, wares, or merchandise whatsoever, except in pursuance of license and authority of the President, as provided in this Title, or who makes any false statement or representation upon which license and authority is granted for such transportation, sale, or other disposition, or who, under any license or authority obtained, willfully and knowingly transports, sells, or otherwise disposes of any other goods, wares, or merchandise than such as are in good faith so licensed and authorized, or who willfully and knowingly transports, sells, or disposes of the same, or any portion thereof, in violation of the terms of such license or authority, or of any rule or regulation prescribed by the Secretary of the Treasury concerning the same, or who is guilty of any act of embezzlement, of willful misappropriation of public or private money or property, of keeping false accounts, or of willfully making any false returns, shall be deemed guilty of a misdemeanor, and shall be fined not more than five thousand dollars, and imprisoned in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same. *R. S. §306.*

2827. Detention of vessels by customs officers.—Whenever, at any port of entry, the duties on imports can not, in the judgment of the President, be collected in the ordinary way, or by the course provided in the preceding section, by reason of the cause mentioned therein, he may direct that the custom-house for the district be established in any secure place within the district, either on land or on board any vessel in the district, or at sea near the coast; and in such case the collector shall reside at such place, or on shipboard, as the case may be, and there detain all vessels and cargoes arriving within or approaching the district, until the duties imposed by law on such vessels and their cargoes are paid in cash. But if the owner or consignee of the cargo on board any vessel thus detained, or the master of the vessel, desires to enter a port of entry in any other district where no such obstructions to the execution of the laws exist, the master may be permitted so to change the destination of the vessel and cargo in his manifest; whereupon the collector shall deliver him a written permit to proceed to the port so designated. And the Secretary of the Treasury, with the approval of the President, shall make proper regulations for the enforcement on shipboard of such provisions of the laws regulating the assessment and collection of duties as in his judgment may be necessary and practicable. *R. S. §315.*

2828. Armed forces employed to prevent commercial intercourse.—It shall be unlawful to take any vessel or cargo detained under the preceding section from the custody of the proper officers of the customs, unless by process of some court of the United States; and in case of any attempt otherwise to take such vessel or cargo by any force, or combination, or assemblage of persons, too great to be overcome by the officers of the customs, the President, or such person as he shall have empowered for that purpose, may employ such part of the Army or Navy or militia of the United States, or such force of citizen volunteers as may be necessary, to prevent the removal of such vessel or cargo, and to protect the officers of the customs in retaining the custody thereof. *R. S. 5316.*

2829. Confiscation of property employed in aid of insurrection.—Whenever during any insurrection against the Government of the United States, after the President shall have declared by proclamation that the laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person, or his agent, attorney, or employé, purchases or acquires, sells or gives, any property of whatsoever kind or description, with intent to use or employ the same, or suffers the same to be used or employed in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person engaged therein; or being the owner of any such property, knowingly uses or employs, or consents to such use or employment of the same, all such property shall be lawful subject of prize and capture wherever found; and it shall be the duty of the President to cause the same to be seized, confiscated, and condemned. *R. S. 5308.*

Notes of Decisions.

Validity.—The act is constitutional. *Miller v. U. S.* (1870), 11 Wall. 268, 305, 20 L. Ed. 135; *Tyler v. Defrees* (1870), 11 Wall. (U. S.) 331, 20 L. Ed. 161; *Semple v. U. S.* (D. C. 1868), Fed. Cas. No. 12,601; *Kirk v. Lynd* (1882), 1 Sup. Ct. 296, 297, 106 U. S. 315, 27 L. Ed. 193.

Right of confiscation defined.—See *Miller v. U. S.* (1870), 11 Wall. 268, 305, 20 L. Ed. 135.

Property subject to confiscation.—In view of this statute and act of July 17, 1862, *R. S. 5332*, post, 2842, it was held that an order on Aug. 17, 1863, by an officer in command of the forces then in quiet possession of the city of New Orleans, for the confiscation of private property, was unauthorized. *Planters' Bank v. Union Bank* (1872), 16 Wall. 483, 494, 21 L. Ed. 473.

Method of seizure.—Seizure of corporate stocks held sufficient to give the court jurisdiction to condemn them as forfeited. *Miller v. U. S.* (1870), 11 Wall. 268, 294; 20 L. Ed. 135.

In a proceeding to confiscate debts due from a municipal corporation to a person charged to be in rebellion, the method of seizure must conform to the State law as nearly as possible, and notice of the seizure

must be given to the person on whom, by law, process against the corporation is required to be served. *Fairfax v. City of Alexandria* (Va. 1877), 28 Grat. 16.

Enforcement of forfeiture.—To effect a seizure of a debt evidenced by a note, it is necessary for the marshal to take the note into his actual custody. *Pelham v. Way* (1872), 15 Wall. 196, 202; 21 L. Ed. 55.

Forfeitures declared under this act can only be enforced by seizure of the property. *U. S. v. Stevenson* (C. C. & D. C. 1869), Fed. Cas. No. 16396.

Nature of property.—The act extended to all descriptions of property, real or personal, on land or water. An owner of real property in New Orleans, who leased it during the Rebellion to a firm publicly engaged in manufacturing arms for the Confederacy, the leases stating in terms that lessees intended to establish "engines, machinery," etc., in the property leased, was presumed to know the purpose for which it was to be used and to have consented to it, and his interest in the property was rightly confiscated under this act, but the presumption was held to be otherwise as to a party taking a mortgage from him before lessees took possession.

sion, and where there was no proof of consent to such use by the mortgage beyond the fact of taking the mortgage, and the interest of the mortgagee was held not confiscable under the act. *Union Ins. Co. v. U. S.* (1867), 6 Wall. 759, 765, 18 L. Ed. 879; [C. S. p. 12,481].

Knowledge and consent of owner to unlawful use of property.—A forfeiture of property is imposed by this act only where it is employed, with the knowledge or consent of its owner, in aid of insurrection. *U. S. v. One Thousand Seven Hundred and Fifty-Six Shares of Capital Stock* (C. C. 1865), Fed. Cas. No. 15,961; (1869) 13 Op. Atty. Gen. 105.

Property of a resident of a loyal State employed in trade with the insurgents, is subject to confiscation, regardless of the question of violation of blockade, or of the

owner's ignorance of the law. *The Shark* (D. C. 1862), Fed. Cas. No. 12,708.

Effect of pardon and amnesty.—A full pardon and amnesty by the President for all offenses committed by the owner of property seized under this act relieved him from forfeitures of such property so far as the right accrued to the United States. *Armstrong's Foundry v. U. S.* (1867), 6 Wall. 766, 769, 18 L. Ed. 882.

Purchase of property condemned.—This act was aimed exclusively at the property itself, to weaken insurrection, and not to punish the owner. Consequently the purchaser of property condemned thereunder took title in fee, and not a mere life estate for the life of the owner. *Kirk v. Lynd* (1882), 1 Sup. Ct. 296, 106 U. S. 315, 27 L. Ed. 193; decree affirmed, *Kirk v. Lewis* (C. C. 1881), 9 Fed. 645.

2830. Confiscated property condemned by courts.—Such prizes and capture shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same be seized, or into which they may be taken and proceedings first instituted. *R. S. 5309.*

Section fifty-three hundred and nine is amended by inserting, in the third line, after the word "same", the word "may". *Act of Feb. 27, 1877 (19 Stat. 253), amending R. S. 5809.*

The words "or circuit," in this section, were superseded by the abolition of the circuit courts and the transfer of their jurisdiction to the district courts, by secs. 289-291, Jud. Code.

Notes of Decisions.

Jurisdiction.—A circuit court held to have no jurisdiction to proceed by information under this and the following sections, where land sold to the Confederacy was seized during the war and subsequently sold and conveyed by order of the President and the conveyance confirmed by act of Congress. *U. S. v. Huckabee* (1872),

16 Wall. 414, 424; 21 L. Ed. 457; [C. S. p. 12,483].

Sale.—A purchaser of real property condemned under the confiscation act, takes title in fee. *Kirk v. Lynd* (1882), 1 Sup. Ct. 296; 106 U. S. 315; 27 L. Ed. 193; [C. S. p. 12,484].

2831. Institution of condemnation proceedings.—The Attorney-General, or the attorney of the United States for any judicial district in which such property may at the time be, may institute the proceedings of condemnation, and in such case they shall be wholly for the benefit of the United States; or any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts. *R. S. 5311.*

Notes of Decisions.

Right to prosecute.—Private persons, other than mere informers, can not join with the United States in prosecuting an information; nor can the United States prosecute such a suit merely to confirm the title of a third party. *U. S. v. Huckabee* (1872), 16 Wall. 414, 430, 21 L. Ed. 457.

Rights of informers.—While an informer may file an information along with the At-

torney General and so make the proceeding inure to his own benefit equally as to the benefit of the United States, yet, after a proceeding has been instituted by the Attorney General alone, an informer can not come in and share the benefits. *Francis v. U. S.* (1866), 5 Wall. 338, 341, 18 L. Ed. 603.

2832. Forfeiture of vessels belonging to citizens of insurrectionary States.—From and after fifteen days after the issuing of the proclamation, as provided in section fifty-three hundred and one, any vessel belonging in whole or in part to any citizen or inhabitant of such State or part of a State whose inhabitants are so declared in a state of insurrection, found at sea, or in any port of the rest of the United States, shall be forfeited. *R. S. 5319.*

Notes of Decisions.

Status of owner.—Vessel belonging to alien woman residing transiently in rebel territory, not engaged in mercantile business, held not subject to confiscation. *The D. F. Keelling (D. C. 1861), Fed. Cas. No. 8,878.*

The fact that a person's place of residence is occupied by the Army of the United States will not affect his status, where the government of the State is still under the control of the insurgents. *U. S. v. The Allegheny (D. C. 1863), Fed. Cas. No. 14,420.*

Before the passage of the ordinance of secession by Virginia, a vessel cleared from Norfolk, owned in Virginia, and her officers and crew were inhabitants of that State. On her return voyage she was captured by a United States man-of-war. Her papers

were regular, and she sailed under the United States flag. Her master testified that he considered himself a subject of the United States, that he considered his allegiance to the Union as greater and stronger than the allegiance to his native State, and that he would sustain the United States against his native State. Held, that the vessel at the time of her capture was enemy property, in consequence of the residence of her owners in the enemy country. *U. S. v. The Sally Mears (1864), 6 D. C. 36.*

Liens.—Where the share of one owner in a vessel was condemned under this act, and the remainder acquitted, held, that the owner of the latter had no lien for outlays in fitting the vessel. *The Mary McRae (D. C. 1861), Fed. Cas. No. 9,221.*

2833. Liens upon condemned vessels.—In all cases wherein any vessel, or other property, is condemned in any proceeding by virtue of any laws relating to insurrection or rebellion, the court rendering judgment of condemnation shall, notwithstanding such condemnation, and before awarding such vessel, or other property, or the proceeds thereof, to the United States, or to any informer, first provide for the payment, out of the proceeds of such vessel, or other property, of any bona-fide claims which shall be filed by any loyal citizen of the United States, or of any foreign state or power at peace and amity with the United States, intervening in such proceeding, and which shall be duly established by evidence as a valid claim against such vessel, or other property, under the laws of the United States or of any State thereof not declared to be in insurrection. No such claim shall be allowed in any case where the claimant has knowingly participated in the illegal use of such ship, vessel, or other property. This section shall extend to such claims only as might have been enforced specifically against such vessel, or other property, in any State not declared to be in insurrection, wherein such claim arose. *R. S. 5322.*

Notes of Decisions.

Proof and priority of liens and claims.—A lien on enemy's property set up under act of Mar. 3, 1863, to protect the liens of all citizens of vessels and other property which belonged to rebels, was not sufficiently proved by the test oath of the party setting up a lien and asserting it without any specification as to date of origin, "from correspondence" with the parties and "copies of the invoice of the cargo" sworn to as "believed to be true,"

the correspondence and copies not being produced, nor their absence accounted for. *The Sally Magee (1865), 3 Wall. 451, 458, 18 L. Ed. 197.*

The mere affidavit of a claimant that he is not within the exceptions of a proclamation which he sets up in support of his claim is not sufficient proof that he is not. *The Gray Jacket (1866), 72 U. S. (5 Wall.) 842, 18 L. Ed. 646.*

A mortgagee of a vessel captured as a prize can not claim that his rights are superior to those of the captors because he was a loyal citizen. *The Hampton* (1866), 5 Wall. 372, 375, 18 L. Ed. 659.

Vessels captured *jure belli*.—A vessel was captured *jure belli* and not under the non-

intercourse acts of Congress, and the vessel and cargo libeled as enemy property simply and in that character alone were condemned. Held, that the case did not come within this section. *U. S. v. The Hampton* (1864), 6 D. C. 75.

2834. Declaration of war.—The Congress shall have power * * *

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; * * * *Art I, sec. 8, Constitution of the United States.*

Notes of Decisions.

Declaring war in general.—The power to declare war is exclusively vested in Congress. *Perkins v. Rogers* (1871), 35 Ind. 124, 9 Am. Rep. 639.

This clause relates only to wars with foreign nations. *Norris v. Doniphan* (1863), 61 Ky. (4 Metc.) 383.

Blockades and commercial intercourse during war.—The charges which the Treasury regulations required to be paid as a condition of carrying on trade in the insurrectionary States were imposed in the exercise of the war power. *Hamilton v. Millin* (1874), 21 Wall. 73, 87, 22 L. Ed. 528.

The proclamation of the blockade is of itself conclusive evidence of the existence of war warranting the blockade. *The Mary Clinton* (C. C. 1863), Fed. Cas. No. 9,203.

Concession of belligerent rights by the legislative and executive departments to rebels establishes no rights except during the war. *Shortridge v. Macon* (C. C. 1867), Fed. Cas. No. 12,812.

The President may lawfully proclaim a blockade of any of the ports of the United States when in his judgment the exigency for such action has arisen, though Congress alone has power, under the Constitution, to declare war and grant letters of marque. *U. S. v. The Tropic Wind* (1861), 6 D. C. 351.

Recognition of state of war and belligerent rights.—Whether war be made by invasion of a foreign nation, or by States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral," for war may exist without a declaration on either side, and a declaration of war by one country only is not a mere challenge, to be accepted or refused at pleasure by the other. *Prize Cases* (1862), 2 Black, 635, 668, 17 L. Ed. 459.

The power of making war is exclusively vested in Congress, but the President has power to repel invasions by hostile forces, even when Congress has not declared war. *U. S. v. Smith* (C. C. 1806), Fed. Cas. No. 16,342.

The practice of a formal proclamation before recognizing an existing war and

capturing enemy's property has fallen into disuse in modern times, and actual hostilities may determine the date of the commencement of war, though no proclamation may have been issued; no declaration made, and no action of the legislative branch of the Government had. *The Buena Ventura* (D. C. 1898), 87 Fed. 927; decree reversed (1899), 20 Sup. Ct. 148, 175 U. S. 384, 44 L. Ed. 206; decree affirmed. *The Panama* (1900), 20 Sup. Ct. 489, 176 U. S. 535, 44 L. Ed. 577.

A public war, within the meaning of the Constitution and the Rules and Articles of War (act of Apr. 10, 1806), has existed with the Seminoles since the day Congress recognized their hostilities and appropriated money to suppress them. (1838) 3 Op. Att. Gen. 307.

War against States.—By the Constitution, Congress alone has the power to declare a national or foreign war, but it can not declare war against a State, or any number of States, by virtue of any clause in the Constitution. *Prize Cases* (1862), 2 Black, 625, 668, 688, 17 L. Ed. 459.

Authority to suppress rebellion is found in the power to suppress insurrection and carry on war; and authority to provide for the restoration of State governments, under the Constitution, when subverted and overthrown is derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and, for the time, excludes the national authority from its limits, seems to be a necessary complement to the other. *Texas v. White* (1868), 74 U. S. (7 Wall.) 700, 19 L. Ed. 227.

Congress is not deprived of its power when its exercise is called out by civil war. *Tyler v. Defrees* (1870), 11 Wall. 331, 345, 20 L. Ed. 161.

Although it is clear that the Constitution does not give Congress power, either expressly or by implication, to make war against a State, and to require the executive to carry it on by force drawn from the other

States, yet that question is one for Congress itself to consider. (1860) 9 Op. Atty. Gen. 517. [C. S. p. 13,498.]

Insurrection or rebellion constituting war.—No formal declaration of war by the President, in the case of the War of the Rebellion, was necessary to render lawful the means adopted by him to repel the warlike measures of the enemy. The *Hawatha* (D. C. 1861), Fed. Cas. No. 6,451.

The late insurrection of the Southern States did not become a civil war until after the proclamation of President Lincoln, issued Aug. 16, 1861, pursuant to act of July 13, 1861, placing the inhabitants of the Southern States in a state of insurrection. *Perkins v. Rogers* (1871), 35 Ind. 124, 9 Am. Rep. 639; [C. S. p. 13,499].

Exercise of war powers.—By virtue of its power to make war and suppress insurrection, the Government has the right to transport troops to all parts of the Union by the usual and most expeditious mode, and a State tax on passengers carried out of the State is void as an interference therewith. *Crandall v. Nevada* (1867), 6 Wall. 35, 44, 18 L. Ed. 745.

Under its power to declare war, Congress may carry on war and collect revenue for that purpose. The *Legal Tender Cases* (1870), 12 Wall. 457, 546, 20 L. Ed. 287.

As incident to the power of making war, the National Government has the power to bury the dead who have fallen in battle and to appropriate for this purpose such lands for national cemeteries as are necessary to hold such burial places and protect them from desecration. (1869) 13 Op. Atty. Gen. 131.

When Congress declares war, by that declaration it puts in force the laws of war, and the war powers of the Government which are not to be exercised, under the Constitution, in time of peace, come into full force by virtue of the Constitution, and are to be exerted by the President and Congress. After the declaration of war, every act done in carrying on the war is an act done by virtue of the Constitution, which authorized the war to be commenced. Every measure of Congress, and every Executive act performed by the President, intended and calculated to carry the war to a successful issue, are acts done under the Constitution, whether the act or the measure be for the raising of money to support armies, or a declaration of freedom to fill their ranks and weaken the enemy, whether it be the organization of military tribunals to try traitors, or the destruction of their property by the advancing army, without due process of law, and the validity of such acts must be de-

termined by the Constitution. *McCormick v. Humphrey* (1866), 27 Ind. 144.

Since Congress has the constitutional power to declare war, it follows that Congress must possess the choice of means, and must be empowered to use any means which are, in fact, conducive to the exercise of the constitutional grant of power. *Id.*

The law of nations imposes only the limit on the war power of the United States, and there is no difference in this respect between a foreign and a civil war. *Knoefel v. Williams* (1868), 30 Ind. 1.

Assuming that a conscript by furnishing a substitute, as authorized by act of Apr. 16, 1862, made a contract with the Government, the latter, under the power to declare war and raise and support armies, may annul such contract without making any compensation; exemption from military service not being property, but a mere personal privilege. *Gatlin v. Walton* (1864), 60 N. C. 325, 1 Winst. 333.

Martial law.—Martial law can not suspend the Constitution as the guardian of the person and property of a private citizen who is not an enemy to the Government, and has been guilty of no hostile act. *Corbin v. Marsh* (1865), 63 Ky. (2 Duv.) 193.

Martial law is limited to the theater of active military operations, where no civil authority remains, and there is a necessity to furnish a substitute to preserve the safety of the Army and society; and martial rule can only prevail until the laws can have their free course. *McLaughlin v. Green* (1874), 50 Miss. 453.

See *Ex parte Vallandigham* (C. C. 1863), Fed. Cas. No. 16,816.

Acquisition and government of territory.—The Government possesses the power of acquiring territory by conquest. *American Ins. Co. v. Canter* (1828), 1 Pet. 511, 542, 7 L. Ed. 242; *Pollard v. Kibbe* (1840), 14 Pet. 353, 392, 10 L. Ed. 490.

The power to declare war is conferred on Congress to enable the General Government to vindicate by arms its own rights and the rights of its citizens, and a war declared by Congress is not presumed to be waged for conquest, and the boundaries of the United States may only be extended by the treaty-making power or legislative authority. *Fleming v. Page* (1850), 9 How. 603, 614, 13 L. Ed. 276.

A military occupation which will give the right to exercise governmental authority is not merely an invasion, but is an invasion plus possession of the enemy's country for the purpose of holding it temporarily, at least. *MacLeod v. U. S.* (1913), 33 Sup. Ct. 955, 229 U. S. 416, 57 L. Ed. 1260.

The power conferred on the Government to make war and treaties implies the power to acquire territory, either by conquest or treaty; and the power to govern such territory until it is fit to be admitted into the Union as a State results from the acquisition thereof. *Nelson v. U. S.* (C. C. 1887), 30 Fed. 112, affirming (*D. C.* 1880), 20 Fed. 202.

The power to acquire additional territory rests on the power to declare war. *Ex parte Ortiz* (C. C. 1900), 100 Fed. 955, 958.

Government established in a conquered territory by the orders of the military power occupying the same endures while the occupation continues, and ends with the restoration of peace and the resumption of the regular civil municipal Government. *Isbell v. Farris* (1868), 45 Tenn. (5 Cold.) 426.

Captures on land and water.—Enemy property found here, on land, at the commencement of hostilities, can not be condemned without a legislative act authorizing confiscation. The declaration of war is not such an act. *Brown v. U. S.* (1814), 8 Cranch, 110, 125, 126, 3 L. Ed. 504.

Captured and abandoned property act of Mar. 12, 1863, held within the power to "make regulations concerning captures on land and water." *Haycraft v. U. S.* (1874), 22 Wall. 81, 94, 22 L. Ed. 738.

Seizure and confiscation of property.—A military commander, under circumstances of actual, urgent, immediate, and pressing public necessity may take private property. *Harmony v. Mitchell* (C. C. 1850), Fed. Cas. No. 6,082; *Holmes v. Sheridan* (C. C. 1870), Fed. Cas. No. 6,644.

The mere declaration of war does not confiscate enemy property or debts due to an enemy, nor does it so vest the property or the debts in the Government, as to support judicial proceedings for the confiscation of the property or debts, without expression of the will of the Government, through its proper department, to that effect. Under the Constitution of the United States, the power of confiscating enemy property and debts due to an enemy is in Congress alone. *Britton v. Butler* (C. C. 1872), Fed. Cas. No. 1,903.

The United States may take and use real estate during war for war purposes, but may not, by any summary proceeding, divest the title of the owner, nor the power to retain possession beyond the period during which the occasion for the taking continued. (1896), 21 Op. Atty. Gen. 382.

If the provisions of the confiscation act of July 17, 1862, are unconstitutional and void, it seems clear that Congress has no power to prohibit the State courts from giving to the owners the relief to which they are entitled by the laws of the States. *Norris v. Doniphan* (1863), 61 Ky. (4 Metc.) 385.

The right given by the Constitution to make war upon rebels gives the power to perform acts of war, and no other power whatever, and the seizure and confiscation of enemy's property on land are not acts of war. *Id.*

The seizure and sale of property does not pass title unless warranted by the usages of war, but Const. Mo. art. 11, sec. 4, protecting officers from prosecutions for unlawful seizures made during the Rebellion, is valid. *Williamson v. Russell* (1872), 49 Mo. 185. [C. S. p. 13,501.]

2835. Declaration of a state of war with Germany.—That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States. *Joint Res. 1, Apr. 6, 1917* (40 Stat. 1).

That in the interpretation of any provision relating to the duration or date of the termination of the present war or of the present or existing emergency, meaning thereby the war between the Imperial German Government and the Imperial and Royal Austro-Hungarian Government and the Government and people of the United States, in any Acts of Congress, joint resolutions, or proclamations of the President containing provisions contingent upon the duration or the date of the termination of such war or of such present or existing emergency, the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war or of the present or

existing emergency, notwithstanding any provision in any Act of Congress or joint resolution providing any other mode of determining the date of such termination. And any Act of Congress, or any provision of any such Act, that by its terms is in force only during the existence of a state of war, or during such state of war and a limited period of time thereafter, shall be construed and administered as if such war between the Governments and people aforesaid terminated on the date when this resolution becomes effective, any provision of such law to the contrary notwithstanding; excepting, however, from the operation and effect of this resolution the following Acts and proclamations, to wit: Title 2 of the Act entitled "The Food Control and District of Columbia Rents Act," approved October 22, 1919 (Forty-first Statutes, page 297), the Act known as the Trading with the Enemy Act, approved October 6, 1917 (Fortieth Statutes, page 411), and all amendments thereto, and the First, Second, Third, and Fourth Liberty Bond Acts, the Supplement to the Second Liberty Bond Act, and the Victory Liberty Loan Act; titles 1 and 3 of the War Finance Corporation Act (Fortieth Statutes, page 506) as amended by the Act approved March 3, 1919 (Fortieth Statutes, page 1313), and Public Resolution Numbered 55, Sixty-sixth Congress, entitled "Joint resolution directing the War Finance Corporation to take certain action for the relief of the present depression in the agricultural sections of the country, and for other purposes," passed January 4, 1921; also the proclamations issued under the authority conferred by the Acts herein excepted from the effect and operation of this resolution: * * *

Nothing herein contained shall be held to exempt from prosecution or to relieve from punishment any offense heretofore committed in violation of any Act hereby repealed or which may be committed while it remains in force as herein provided. *Joint Res. 64, March 3, 1921 (41 Stat. 1359-1360).*

Notes of Decisions.

Construction.—In an opinion of April 11, 1921, the Attorney General held that the following acts, *inter alia*, are affected by the above resolution "and that the same come within its intended purpose of restoring the internal affairs of the United States to a peace-time basis," namely: Sec. 16, act of May 22, 1917 (40 Stat. 87);

act of July 9, 1918 (40 Stat. 885); sec. 5, act of Oct. 6, 1917 (40 Stat. 383); sec. 213(8), act of Feb. 24, 1919 (40 Stat. 1060); sec. 204, war risk insurance act of Oct. 6, 1917 (40 Stat. 403). (For the sections of this book in which the above provisions may be found, see Table of Citations, post, p. 1507).

2836. Declaration of a state of war with Austria-Hungary.—That a state of war is hereby declared to exist between the United States of America and the Imperial and Royal Austro-Hungarian Government; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial and Royal Austro-Hungarian Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States. *Joint Res. 17, Dec. 7, 1917 (40 Stat. 429).*

CHAPTER 45.

DISLOYALTY.

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2837. United States defined.—The term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States. *Sec. 1, title XIII, act of June 15, 1917 (40 Stat. 231).*

2838. Jurisdiction in the Philippine Islands and the Canal Zone.—The several courts of first instance in the Philippine Islands and the district court of the Canal Zone shall have jurisdiction of offenses under this Act committed within their respective districts, and concurrent jurisdiction with the district courts of the United States of offenses under this Act committed upon the high seas, and of conspiracies to commit such offenses, as defined by section thirty-seven of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine, and the provisions of said section, for the purpose of this Act, are hereby extended to the Philippine Islands, and to the Canal Zone. In such cases the district attorneys of the Philippine Islands and of the Canal Zone shall have the powers and perform the duties provided in this Act for United States attorneys. *Sec. 2, title XIII, act of June 15, 1917 (40 Stat. 231).*

Sec. 37, act of Mar. 4, 1909 (35 Stat. 1096), establishes the penalty for a conspirator or conspirators attempting to defraud the United States.

2839. Prosecution of offenses.—Offenses committed and penalties, forfeitures, or liabilities incurred prior to the taking effect hereof under any law embraced in or changed, modified, or repealed by any chapter of this Act may be prosecuted and punished, and suits and proceedings for causes arising or acts done or

committed prior to the taking effect hereof may be commenced and prosecuted, in the same manner and with the same effect as if this Act had not been passed. *Sec. 3, title XIII, act of June 15, 1917 (40 Stat. 231).*

2840. Partial invalidity of the Espionage Act.—If any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. *Sec. 4, title XIII, act of June 15, 1917 (40 Stat. 231).*

2841. Treason defined.—Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason. *Sec. 1, Criminal Code, act of March 4, 1909 (35 Stat. 1088).*

Notes of Decisions.

Definition.—For definition and discussion of treason, see *U. S. v. Werner* (D. C. 1918), 247 Fed. 708.

To constitute a levying of war, there must be an assemblage of persons for the purpose of effecting by force a treasonable purpose. Enlistment of men to serve against Government is not sufficient. When war is levied, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors. Any assemblage of men for the purpose of revolutionizing by force the Government established by the United States in any of its Territories, although as a step to, or the means of executing some greater projects, amounts to levying war. The traveling of individuals to the place of rendezvous is not sufficient; but the meeting of particular bodies of men, and their marching from places of partial, to a place of general, rendezvous, is such an assemblage as constitutes a levying of war. *Ex parte Bollman* (1807), 4 Cranch, 75, 125, 2 L. Ed. 554.

A conspiracy to prevent by force, the execution of any one law of the United States in all cases, is a treasonable conspiracy; and if there be an actual assemblage of men for the purpose of carrying this intention into effect—that is, of acting together, and preventing by force the execution of the law generally—this constitutes a levying of war, and involves the crime of treason. Charge to Grand Jury, *Treason* (C. C. 1842), Fed. Cas. No. 18,275; Charge to Grand Jury, *Fugitive Slave Law* (C. C. 1851), Fed. Cas. No. 18,262; Charge to Grand Jury, *Treason* (D. C. 1863), Fed. Cas. No. 18,274.

The sudden outbreak of a mob, or the assembling of men, in order, by force, to

prevent the execution of a law in a particular instance, and then to disperse, without any intention of continuing together or reassembling for defeating the law generally and in all cases, is not a levying of war such as constitutes treason. Charge to Grand Jury, *Fugitive Slave Law* (C. C. 1851), Fed. Cas. No. 18,262; Charge to Grand Jury, *Treason* (D. C. 1863), Fed. Cas. No. 18,274.

The combination of a body of men, with the design of seizing, and the actual seizing, of the forts and other public property of the United States, is a levying of war against the United States, and is treason. Charge to Grand Jury, *Treason* (C. C. 1861), Fed. Cas. No. 18,270; *Id.* (D. C. 1863), 18,274.

A combination to suppress the excise officers of the Government, and prevent the execution of an act of Congress, accompanied by a display of force, consisting of a number of men arrayed in a military manner, and with arms, and by acts of violence, for the purpose of compelling an excise officer to resign his commission, is a levying of war, and constitutes treason. *U. S. v. Mitchell* (C. C. 1795), Fed. Cas. No. 15,788, 2 Dall. 348, 1 L. Ed. 410; *Same v. Vigol* (C. C. 1795), Fed. Cas. No. 16,821, 2 Dall. 346, 1 L. Ed. 409.

To go, with a large party, in arms, marshaled and arrayed, to the houses of officers of the excise, and there commit acts of violence and devastation, with the avowed object of suppressing such offices, and compelling the resignation of the officers for the purpose of nullifying an act of Congress, is treason. *Id.*

Opposing, by force of arms, an act of Congress, with a view to defeating its efficacy, and thus defying the authority of the Government is levying war against the

United States, and constitutes treason. *Case of Fries* (C. C. 1799), Fed. Cas. No. 5,126.

An insurrection to resist by force the execution of a Federal tax law, or the militia called out to enforce it, on any ground whatever, is a levying of war against the United States. *Case of Fries* (C. C. 1800), Fed. Cas. No. 5,127.

A conspiracy to raise an insurrection to resist the execution of a Federal statute by force is only a misdemeanor. Treason is not committed until the persons proceed to carry the intention into execution by force. *Id.*

Either acts of hostility and resistance to the Government, or a hostile intention in the body assembled, are necessary to convert a meeting of men with ordinary appearances into an act of levying war. A treasonable intent on the part of the leader, uncommunicated to the assemblage, is not sufficient. *U. S. v. Burr* (C. C. 1807), Fed. Cas. No. 14,894a.

An intention to commit treason against the United States by levying war, not carried out by the actual assembling of troops, is not punishable as treason. *Id.*

The engaging or enlisting of men for levying war against the United States, not followed by a future embodying of such men, is not punishable as treason. *Id.*

The fact of levying war may consist of a multiplicity of acts performed in different places by different persons, and any one of such persons, when leagued in the general conspiracy, is liable as a principal traitor. *Id.*

If there be an assembly of persons, with force, with an intent to prevent the collection of lawful taxes or duties levied by the Government, or to destroy all custom-houses, or to resist the administration of justice in the courts of the United States, and the assemblage proceed to execute this purpose by force, this is treason against the United States. Charge to Grand Jury, Treason (C. C. 1842), Fed. Cas. No. 18,275.

If the assembly is arrayed in a military manner, if they are armed and marched in military form, for the express purpose of overawing and intimidating the public, and thus attempt to carry into effect the treasonable design, this will, of itself, amount to a levy of war, although no actual blow be struck or engagement take place. *Id.*

There may be treason against a State by levying war which is aimed altogether against the sovereignty of the State. *Id.*

To constitute treason against the United States by levying war, there must be a levying of war against the United States in their sovereign character and not merely a

levying of war exclusively against the sovereignty of a particular State. *Id.*

Direct proof of the combining to prevent the enforcement of a law may be found in declared purposes of the individual party before the actual outbreak, or it may be derived from proceedings of meetings in which he took part openly, or which he either prompted or made effective by his countenance or sanction, commending, counselling, or instigating forcible resistance to the law. Charge to Grand Jury, Treason (C. C. 1851), Fed. Cas. No. 18,276.

The words "levying war," as used in the constitutional definition of "treason," include not only the act of making war for the purpose of entirely overturning the Government, but also any combination forcibly to oppose the execution of any public law of the United States, with intent to prevent its enforcement in all cases, if accompanied or followed by an act of forcible opposition to such law in pursuance of such combination. Charge to Grand Jury, Neutrality Laws and Treason (C. C. 1851), Fed. Cas. No. 18,269; Charge to Grand Jury, Treason (C. C. 1851), Fed. Cas. No. 18,276.

To be employed in actual service in an army raised to oppose the Government in its action, or directly or indirectly to aid or assist in the levying or embodying of a military force for the subversion of the Government, are plainly acts of "levying war," and involve the commission of the crime of treason. The constitutional definition of treason, however, is of broader signification, and includes all those who join a hostile army after war is begun. Charge to Grand Jury, Treason (C. C. 1861), Fed. Cas. No. 18,272.

All persons engaged therein are by the law regarded as levying war against the United States; and all who adhere to them are to be regarded as enemies; and all who give them, in any part of the United States, aid and comfort come within the provisions of the act of Apr. 30, 1790, and are guilty of treason. *Id.*

A letter of marque issued by an insurrectionary government, which has not been recognized by the legislative and executive departments of the existing Government, is no defense to treason in levying war under such letter. *U. S. v. Greathouse* (C. C. 1863), Fed. Cas. No. 15,254.

Levying war against the United States by citizens of the Republic, under the pretended authority of the new State government of North Carolina, or of the so-called "Confederate Government," is treason against the United States. *Shortridge v. Macon* (C. C. 1867), Fed. Cas. No. 12,812.

Levying war against the United States by persons however combined and confederated, even though successful in establishing their actual authority in several States, is treason. *Keppel v. Petersburg R. Co.* (C. C. 1868), Fed. Cas. No. 7,722.

If a convention, legislature, junta, or other assemblage entertain the purpose of subverting the Government, and to that end pass acts, resolves, ordinances, or decrees, even with the view of raising a military force to carry their purpose into effect, this alone does not constitute a levying of war. *Charge to Grand Jury, Treason* (D. C. 1863), Fed. Cas. No. 18,274.

If a body of men be actually assembled in force, in a condition to make war, in order to overturn the Government at any one place by force, this is levying war. It is not necessary that the assemblage should be with military arms and array; numbers alone may supply the requisite force. *Id.*

Adhering to enemies and giving them aid and comfort.—The going from the enemy's squadron to the shore for the purpose of peaceably procuring provisions for the enemy is not an act of treason; otherwise where provisions are carried toward the enemy with intent to supply them, though such intention is defeated. *U. S. v. Pryor* (C. C. 1814), Fed. Cas. No. 16,096.

Delivering up prisoners and deserters to an enemy is treason, and nothing but a well-grounded fear of life will excuse the act. *U. S. v. Hodges* (C. C. 1815), Fed. Cas. No. 15,374.

A person present, directing, aiding, abetting, counseling, or countenancing the violence, or if, though absent at the time of its actual perpetration, he yet directed the act, or devised or knowingly furnished the means for carrying it into effect, and instigated others thereto, he is guilty of treason. *Charge to Grand Jury, Treason* (C. C. 1851), Fed. Cas. No. 18,276.

The words, "adhering to their enemies, giving them aid and comfort," include, in general, any act committed after war actually exists which indicates a want of loyalty to the Government and sympathy with its enemies, and which, by fair construction, is directly in furtherance of their hostile designs. *Charge to Grand Jury, Treason* (C. C. 1861), Fed. Cas. No. 18,272.

Mere expressions of opinion indicative of sympathy with the public enemy are not sufficient, under the Constitution and laws, to warrant a conviction of treason. *Id.*

After war actually exists, it is treasonable to sell to, or provide arms or munitions of war, or military stores and supplies, including foods, clothing, etc., for the use of the enemy; to hire, sell, or furnish boats,

railroad cars, or other means of transportation, or to advance money or obtain credits for the use and support of the hostile army; and to communicate intelligence to the enemy by letter, telegraph, or otherwise, relating to the strength, movements, or position of the army. *Id.*

Overt acts which, if successful, would advance the interests of the rebellion, amount to aid and comfort, though they failed. *U. S. v. Greathouse* (C. C. 1863), Fed. Cas. No. 15,254.

If war be actually levied at one place, and any person actually engaged therein send them arms, money, provisions or intelligence for the purpose of aiding them, he is guilty. *Charge to Grand Jury, Treason* (D. C. 1863), Fed. Cas. No. 18,274.

And it makes no difference how distant he may be from the place of the assemblage of the enemy. *Id.*

It is treason for a citizen or other person not commissioned within the United States to abet France during a maritime war with her. (1798) 1 Op. Atty. Gen. 84.

Felonious intent.—Treason in the assembling of bodies of men, armed or arrayed in a warlike manner, is determined by the intent. If the purpose be of a private nature, it is not treason, regardless of the acts actually committed; otherwise, where the intent is to effect some object of general public nature. *Case of Fries* (C. C. 1800), Fed. Cas. No. 5,127.

If a man joins and acts with an assembly of people, his intent is always to be considered and adjudged to be the same as theirs; and the law judges of the intent by the fact. *Case of Fries* (C. C. 1800), Fed. Cas. No. 5,127.

A conspiracy to resist by force the execution of a law of the United States in particular instances only, for personal or private purposes only, is not treason. *U. S. v. Hoxie* (C. C. 1808), Fed. Cas. No. 15,407.

A felonious intent is necessary to commit treason. *The Ambrose Light* (D. C. 1885), 25 Fed. 408, 427.

Duress and compulsion.—The putting in fear which is sufficient to excuse the perpetration of a criminal act must proceed from an immediate and actual danger threatening the life of the accused. The apprehension of the loss of property or of slight or remote injury to the person is not sufficient. *U. S. v. Vigol* (C. C. 1795), Fed. Cas. No. 16,621.

Except in the case of force under a personal fear of death, a private soldier or subordinate officer can not excuse a treasonable act on the ground of compulsion. *U. S. v. Greiner* (D. C. 1861), Fed. Cas. No. 15,262.

Persons regarded as enemies.—In a civil war, persons who adhere to their allegiance are not, although they reside in an insurrectionary district, regarded as enemies; and trade with such persons, in good faith and without collusion with the enemy, is lawful, unless interdicted by the Government. Charge to Grand Jury, Treason (C. C. 1861), Fed. Cas. No. 18,271.

Overt acts.—See, also, notes under 2849, post.

It is necessary to produce two direct witnesses to the whole overt act; a conviction can not be had on the testimony of one witness, together with circumstantial evidence, though it is well nigh conclusive. *U. S. v. Robinson* (D. C. 1919), 259 Fed. 685; compare *U. S. v. Fricke* (D. C. 1919), 259 Fed. 673, 677.

The fact that treason might incidentally arise in the attempt to embark troops against a foreign nation, with which the United States is at peace, will not affect a previous assemblage of troops, where the treason was neither committed nor intended. *U. S. v. Burr* (C. C. 1807), Fed. Cas. No. 14,694n.

A person who advised or procured a warlike assemblage, charged as the overt act of treason can not be convicted of treason until after the conviction of one of those charged with the overt act. *U. S. v. Burr* (C. C. 1807), Fed. Cas. No. 14,693.

An indictment for levying war against the United States must specify an overt act, and the charge must be proved as laid. *U. S. v. Burr* (C. C. 1807), Fed. Cas. No. 14,693.

And there must be some overt act done, or some attempt made by them, with force, to execute, or toward executing, that purpose. The assembly must be in a condition to use force, and must intend to use it, if necessary, to further, aid, or accomplish the treasonable design. Charge to Grand Jury, Treason (C. C. 1842), Fed. Cas. No. 18,275.

Where a body of armed men is mustered in military array for a treasonable purpose, every step which any one of them takes, by marching or otherwise, in part execution of such purpose, is an overt act of treason in levying war. *U. S. v. Greiner* (D. C. 1861), Fed. Cas. No. 15,262.

Words, oral, written, or printed, however treasonable, seditious, or criminal of themselves, do not constitute an overt act of treason. Charge to Grand Jury, Treason (C. C. 1861), Fed. Cas. No. 18,271.

Purchase of a vessel, and fitting her up for service with arms and ammunition, and the employment of men to manage it, in pursuance of a design to commit hostilities on the high seas in aid of an existing re-

bellion against the United States, are overt acts of treason. *U. S. v. Greathouse* (C. C. 1863), Fed. Cas. No. 15,254.

Persons liable in general.—If a body of men be actually assembled to effect by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered guilty of treason. Charge to Grand Jury, Neutrality Laws and Treason (C. C. 1851), Fed. Cas. No. 18,269; Charge to Grand Jury, Treason and Piracy (C. C. 1861), Fed. Cas. No. 18,277.

An alien resident may be guilty of treason by cooperating either with rebels or foreign enemies. Charge to Grand Jury, Treason (D. C. 1863), Fed. Cas. Nos. 18,274 (C. C. 1851), 18,276.

All who aid in the prosecution of war levied against the United States, whether by open hostilities in the field, or by performing any part in the furtherance of the common object, however minute, or however remote from the scene of action, are guilty of treason. *U. S. v. Greathouse* (C. C. 1863), Fed. Cas. No. 15,254.

In treason there are no accessories. All who engage in rebellion, or who designedly give to it any species of aid and comfort, in whatever part of the country they may be, are principals. *U. S. v. Greathouse* (C. C. 1863), Fed. Cas. No. 15,254; *Case of Fries* (C. C. 1800), Fed. Cas. No. 5,127.

Persons owing allegiance.—The words "owing allegiance to the United States" in this section are surplusage, since treason is a breach of allegiance, and can be committed by one only who owes allegiance either perpetual or temporary. *U. S. v. Wiltberger* (1820), 5 Wheat. 70, 97, 5 L. Ed. 37.

People in rebellion.—Until belligerent rights are accorded by the political department of the Government to the State or people in rebellion, the judiciary must regard them as rebels and lawless aggressors, and apply to them the penal law. Charge to Grand Jury (C. C. 1861), Fed. Cas. No. 18,256.

Belligerent rights conceded to the Confederate States can not be invoked for the protection of persons entering within the limits of a loyal State, and secretly getting up hostile expeditions against the Government. *U. S. v. Greathouse* (C. C. 1863), Fed. Cas. No. 15,254.

The agreement of capitulation between Generals Sherman and Johnston was a mere military parole terminating with the war, and the persons included were liable to arrest for treason after the war. *U. S. v. Rucker* (C. C. 1866), Fed. Cas. No. 18,203.

The National Government conceded belligerent rights to the armies of the Confederate States; and acts of a strictly military character, performed under military authority, may be protected by reason thereof. *U. S. v. Morrison* (C. C. 1869), Fed. Cas. No. 15,817.

The whole existence of the Confederate Government was a continued rebellion against the lawful Government of the United States; and no one can be protected by the sanction of its authority save in acts of war. *Id.*

Rebellion, whether conducted on land or sea, is felonious and treasonable, and punishable by death. *The Ambrose Light* (D. C. 1885), 25 Fed. 408, 427.

Secession ordinances as defense.—The ordinances of secession of the States in rebellion do not furnish any defense to their citizens for treasonable acts against the United States Government. *U. S. v. Cathcart* (C. C. 1864), Fed. Cas. No. 14,756.

Merger of treason against State in treason against United States.—Treason begun against a State may be mixed up or merged in treason against the United States. If the treasonable purpose be to overthrow the Government of the State, and forcibly to withdraw it from the Union, and thereby to prevent the exercise of the national sovereignty within the limits of the State, this would be treason against the United States. *Charge to Grand Jury, Treason* (C. C. 1842), Fed. Cas. No. 18,275.

If the troops of the United States should be called out by the President upon the application of a State legislature or executive, to protect the State against domestic violence, and there should be an assembly of persons with force to resist and oppose the United States troops, this would be treason against the United States, although the primary intention of the insurgents may have been only to overthrow the State government or the State laws. *Charge to Grand Jury, Treason* (C. C. 1861), Fed. Cas. No. 18,272. See, also, *Charge to Grand Jury* (C. C. 1842), Fed. Cas. No. 18,275.

Revolutionizing Territory as means for foreign expedition.—The act of revolutionizing a Territory of the United States, though only as a means for an expedition against a foreign power, is treason. *U. S. v. Burr* (C. C. 1807), Fed. Cas. No. 14,692a.

Quashing indictment.—On motion to quash an indictment for treason, held, that defendant's counsel would be required to file with the clerk a formal statement of the grounds on which the motion was based. *Case of Davis* (C. C. 1867-1871), Fed. Cas. No. 3,621a.

Evidence.—It is not competent, on a trial for treason, to prove that the accused, in the course of the insurrection, joined with others in robbing the mails, when a separate indictment for that offense is already pending against him. *U. S. v. Mitchell* (C. C. 1795), Fed. Cas. No. 15,789.

Where it was claimed that a circular letter had been written by leaders of an insurrection calling citizens to assemble with arms, etc., held, that a copy thereof was not admissible, unless it was proved to be one of the copies actually circulated. *Id.*

Where it is shown by the evidence of several witnesses that accused was present and took part in a treasonable conspiracy, proof by two or more witnesses that he marched as a volunteer with arms and in military array, with a party which actually used force to prevent the execution of an act of Congress, is sufficient without proof by two witnesses that he was actually present when the acts of violence were committed. *Id.*

On the trial of a person indicted for treason in levying war against the United States, the court can not control the order of proof to the extent of requiring the prosecution to prove the overt act charged, before proving the intention with which such act was committed. *U. S. v. Burr* (C. C. 1807), Fed. Cas. No. 14,692h (C. C. 1807), *Id.* 14,693; *Same v. Lee* (C. C. 1814), *Id.* 15,584.

A person will not be held to trial for treason in levying war against the United States on an affidavit that he is enlisting men for such purpose, without proof of the actual embodying of men, where ample time is given to get such proof. *U. S. v. Burr* (C. C. 1807), Fed. Cas. No. 14,692a.

Facts out of the district may be proved after the overt act as corroborative evidence of the intention. *Id.*

The overt act of levying war must be proved by two witnesses before testimony is admissible relative to the conduct or declarations of the prisoner elsewhere, and subsequent to the overt act charged. *Id.*

Proof of remote intentions may be relevant by proof of the continuance of the intention, and consequently is admissible. *Id.*

Query, whether, after proving a connection for some general object between persons accused of treason in levying war, the conversations of one with third persons may be given in evidence against the other to prove what that object was. *Id.*

The declaration of the prisoner accompanying the overt act charged may be proved to show his intention in doing it;

but his confession of committing such act is not admissible. *U. S. v. Lee* (C. C. 1814), Fed. Cas. No. 15,584.

Everything tending to show that there was an intention to make public resistance to a law of the United States is entirely evidence in chief, and can not be received in rebuttal. *U. S. v. Hanway* (C. C. 1851), Fed. Cas. No. 15,299.

Facts occurring and rumors prevalent in the neighborhood which would explain certain particulars relied upon to show

treasonable intent, and make then show a different intent, though a long time in advance of the alleged treasonable occurrence, are admissible. *Id.*

Direct proof of the purpose, however, is not legally necessary. The concert of purpose may be deduced from the concerted action itself, or it may be inferred from facts occurring at the time, or before or afterwards. Charge to Grand Jury, Treason (C. C. 1851), Fed. Cas. No. 18,276.

2842. Penalty for treason.—Whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less than five years and fined not less than ten thousand dollars, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States. *Sec. 2, Criminal Code, act of March 4, 1909 (35 Stat. 1088).*

Besides other penalties, the discharge or dismissal of any person from the military forces on the ground that he is guilty of treason terminates his insurance and bars all rights to compensation or insurance under the war risk insurance act, ante, 1917.

Notes of Decisions.

Death penalty.—Where the treason consists in engaging in or assisting a rebellion or insurrection, the death penalty can not be inflicted, under act of July 17, 1862. *U. S. v. Greathouse* (C. C. 1863), Fed. Cas. No. 15,254.

Disqualification from holding office.—Query, whether the constitutional disqualifications from holding office by having

engaged in rebellion (Amendment 14) operates to exempt from prosecution for treason. *Case of Davis* (C. C. 1867-1871), Fed. Cas. No. 8,621a.

Jurisdiction.—See charge to grand jury, Treason (C. C. 1861), Fed. Cas. No. 18,270.

Confiscation of property, etc., under former laws.—See notes under 2848, post.

2843. Recruiting for service against the United States.—Whoever recruits soldiers or sailors within the United States, or in any place subject to the jurisdiction thereof, to engage in armed hostility against the same, or opens within the United States, or in any place subject to the jurisdiction thereof, a recruiting station for the enlistment of such soldiers or sailors to serve in any manner in armed hostility against the United States, shall be fined not more than one thousand dollars and imprisoned not more than five years. *Sec. 7, Criminal Code, act of March 4, 1909 (35 Stat. 1089).*

Notes of Decisions.

Statute as reaching acts not deemed treasonable.—This section was intended to reach acts not deemed treasonable under

the statute. Charge to Grand Jury, Treason (C. C. 1861), Fed. Cas. No. 18,272.

2844. Enlisting to serve against the United States.—Every person enlisted or engaged within the United States or in any place subject to the jurisdiction thereof, with intent to serve in armed hostility against the United States, shall be fined one hundred dollars and imprisoned not more than three years. *Sec. 8, Criminal Code, act of March 4, 1909 (35 Stat. 1089).*

2845. Criminal correspondence with foreign governments.—Every citizen of the United States, whether actually resident or abiding within the same, or in

any place subject to the jurisdiction thereof, or in any foreign country, without permission or authority of the Government, directly or indirectly, commences or carries on any verbal or written correspondence or intercourse with any foreign government or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the Government of the United States; and every person, being a citizen of or resident within the United States or in any place subject to the jurisdiction thereof, and not duly authorized, counsels, advises, or assists in any such correspondence with such intent, shall be fined not more than five thousand dollars and imprisoned not more than three years; but nothing in this section shall be construed to abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects. *Sec. 5, Criminal Code, act of March 4, 1909 (35 Stat. 1088).*

Notes of Decisions.

Letters urging acknowledgment of independence of insurgents.—It is an offense punishable by fine and imprisonment, under the act of 1799 (1 Stat. 618), for a citizen of the United States, at a time when a part of the inhabitants of the United States

are in rebellion against the Government, to write letters to a member of the British Parliament, urging that body to acknowledge the independence of the insurgents. Charge to Grand Jury, Treason and Piracy (C. C. 1861), Fed. Cas. No. 18,277.

2846. Misprision of treason.—Whoever, owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor or to some judge or justice of a particular State, is guilty of misprision of treason and shall be imprisoned not more than seven years and fined not more than one thousand dollars. *Sec. 3, Criminal Code, act of March 4, 1909 (35 Stat. 1088).*

Notes and Decisions.

Persons guilty of offense.—Persons who have any knowledge of acts of treason, and do not as soon as possible make it known in the manner prescribed by sec. 2, act of

Apr. 30, 1790, are guilty of misprision of treason. Charge to Grand Jury, Treason (C. C. 1861), Fed. Cas. No. 18,270.

2847. Vacant.

2848. Inciting or engaging in rebellion or insurrection.—Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be imprisoned not more than ten years, or fined not more than ten thousand dollars, or both; and shall, moreover, be incapable of holding any office under the United States. *Sec. 4, Criminal Code, act of March 4, 1909 (35 Stat. 1088).*

Notes of Decisions.

See notes under 2841, ante.

Former law as limited to persons owing allegiance.—The general terms of the former statute relating to the same offense held limited to persons owing allegiance to the United States, either perpetual or temporary. *U. S. v. Wiltberger (1820), 5 Wheat. 70, 97, 5 L. Ed. 37.*

Dispatching vessel ultimately intended to carry cargo to blockaded port.—The act of dispatching an American vessel in ballast from a port of the United States with an immediate destination to a neutral port, and an ulterior destination, with cargo taken in at such neutral port, to a blockaded port, is an offense against the United States un-

der this section. (1863) 10 Op. Atty. Gen. 513.

Indictment.—On indictment under sec. 2, act of July 17, 1862, need not use the phrase "levying war" specifically; it is sufficient to follow the language of the act.

U. S. v. Greathouse (C. C. 1863), Fed. Cas. No. 15,254.

Confiscation of property under former law.—See *Bigelow v. Forrest* (1869), 76 U. S. (9 Wall.) 339, 19 L. Ed. 696; [C. S. p. 12,407.]

2849. Seditious conspiracy.—If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than five thousand dollars, or imprisoned not more than six years, or both. *Sec. 6, Criminal Code, act of March 4, 1909 (35 Stat. 1089).*

Notes of Decisions.

Offense in general.—To constitute the offense, there must be a conspiracy to resist generally and publicly by force, and an actual resistance by force or by intimidation of numbers, a law of the United States. *U. S. v. Hanway* (C. C. 1851), Fed. Cas. No. 15,299.

A conspiracy to resist by force the execution of such law in particular instances only, for personal or private purposes only, is not treason. *U. S. v. Hanway* (C. C. 1851), Fed. Cas. No. 15,299; *Same v. Hoxie* (C. C. 1808), id. 15,407.

A conspiracy by force to prevent, hinder, and delay the execution of the joint resolution of Congress of April 6, 1917, declaring a state of war to exist with Germany, is a conspiracy relating to a "law," in view of section 7, Article I, of the Constitution, a joint resolution having the effect of a law. *Wells v. U. S.* (C. C. A. 1919), 257 Fed. 605.

A conspiracy to prevent by force private individuals from producing goods to fulfill their contracts with the Government is not punishable under this section, applying to conspiracy to prevent the execution of the laws of the United States, since this section is limited to obstructions of the laws by the officers of the Government charged with that duty. *Haywood v. U. S.* (C. C. A. 1920), 268 Fed. 795.

Overt act.—Prior to act of July 31, 1861, of which this section is a part, there was no law for punishing treasonable combinations or conspiracies which were not consummated by an overt act. The statute of that date, however, makes criminal not only combinations to overthrow the Government, but conspiracies or mutual agreements, whether by few or many, whether public or private, forcibly to resist, or even to delay, the execution of any law. Charge

to Grand Jury, Treason and Piracy (C. C. 1861), Fed. Cas. No. 18,277; Charge to Grand Jury, Treason (C. C. 1861), Fed. Cas. No. 18,272.

Evidence that one gave his sanction to the listing and pledging of men under oath to resist the military authorities by blowing up bridges and seizing arms and ammunition in the possession of soldiers, that he advised with others in connection therewith and stated that he could control certain men, and ordered a contract in reference to the conspiracy to be written out with another person engaged in the same work, is sufficient to sustain a conviction for seditious conspiracy under section 6 of the Criminal Code (35 Stat. 1088, 1089). It is unnecessary to prove accomplishment of the design of the conspiracy. *Goldman v. U. S.*, 245 U. S. 474, 38 Sup. Ct. 166; *Phipps v. U. S.*, 251 Fed. 879.

Opposing authority of Government or preventing, hindering, or delaying execution of law.—The ill treatment of Chinese in this country, and their expulsion from a town where they reside, is not, in itself, opposing by force the authority of the United States, or preventing the execution of any law thereof, within this section, and such acts are not punishable thereunder. *Baldwin v. Franks* (1887), 120 U. S. 678, 7 Sup. Ct. 658, 657, 32 L. Ed. 766, reversing judgment in *re Baldwin* (C. C. 1886), 27 Fed. 187. Compare *Anderson v. U. S.* (C. C. A. 1920), 269 Fed. 65, where an indictment under this section against members of the I. W. W. was held good and this case distinguished.

A conspiracy or agreement of two or more persons to drive the Chinese out of the United States, or to maltreat or intimidate them, with a view of constraining them to depart therefrom, is *prima facie* a

conspiracy to prevent and hinder the execution, operation, or fulfillment of a law of the United States, namely, the treaties with China of 1868 and 1880, and is an in-

dictable offense under this section. In re Impaneling and Instructing the Grand Jury (D. C. 1886), 26 Fed. 749.

2850. Injury to war materials, premises, etc.—That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully injure or destroy, or shall attempt to so injure or destroy, any war material, war premises, or war utilities, as herein defined, shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned not more than thirty years, or both. *Sec. 2, act of Apr. 20, 1918 (40 Stat. 534).*

2851. Furnishing defective material, tools, etc.—That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully make or cause to be made in a defective manner, or attempt to make or cause to be made in a defective manner, any war material, as herein defined, or any tool, implement, machine, utensil, or receptacle used or employed in making, producing, manufacturing, or repairing any such war material, as herein defined, shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned not more than thirty years, or both. *Sec. 3, act of April 20, 1918 (40 Stat. 534).*

Notes of Decisions.

Attempt.—A conviction can be had for an "attempt" under this section, where the evidence shows a willful advising, so-

llecting, and attempt to influence another to commit the felony named in the act. *U. S. v. De Bolt (D. C. 1918), 253 Fed. 78.*

2852. Definitions.—That the words "war material," as used herein, shall include arms, armament, ammunition, live stock, stores of clothing, food, food-stuffs, or fuel; and shall also include supplies, munitions, and all other articles of whatever description, and any part or ingredient thereof, intended for, adapted to, or suitable for the use of the United States, or any associate nation, in connection with the conduct of the war.

The words "war premises," as used herein, shall include all buildings, grounds, mines, or other places wherein such war material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other military or naval stations of the United States, or any associate nation.

The words "war utilities," as used herein, shall include all railroads, railways, electric lines, roads of whatever description, railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, or aircraft, or any other means of transportation whatsoever, whereon or whereby such war material or any troops of the United States, or of any associate nation, are being or may be transported either within the limits of the United States or upon the high seas; and all dams, reservoirs, aqueducts, water and gas mains and pipes, structures and buildings, whereby or in connection with which water or gas is being furnished,

or may be furnished, to any war premises or to the military or naval forces of the United States, or any associate nation, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply water, light, heat, power, or facilities of communication to any war premises or to the military or naval forces of the United States, or any associate nation.

The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

The words "associate nation," as used in this Act, shall be deemed to mean any nation at war with any nation with which the United States is at war. *Sec. 1, act of Apr. 20, 1918 (40 Stat. 533).*

2853. Obtaining unlawful information.—That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section six of this title; or (b) whoever for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or (c) whoever, for the purpose aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts or induces or aids another to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this title; or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or (e) whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photo-

graphic negative, blue print, plan, map, model, note, or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or both. *Sec. 1, title I, act of June 15, 1917 (40 Stat. 217).*

Sec. 9 of this act repealed the act of Mar. 3, 1911 (36 Stat. 1048), entitled "An act to prevent the disclosure of national defense secrets."

See notes under 2857, post.

Notes of Decisions.

<p>"Arsenal" construed.—This section is applicable to a Government plant for the manufacture of smokeless powder in process of construction. The word "arsenal" as</p>	<p>used in such statutes embraces the powder plants of the Federal Government. 23 Op. Atty. Gen. 444.</p>
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2854. Giving information to foreign governments.—Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; * * * *Sec. 2(a), Title I, act of June 15, 1917 (40 Stat. 218).*

2855. Giving information to foreign governments in time of war.—* * * and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years. *Sec. 2, Title I, act of June 15, 1917 (40 Stat. 218).*

2856. Property or papers for the aid of a foreign government.—Whoever, in aid of any foreign Government, shall knowingly and willfully have possession of or control over any property or papers designed or intended for use or which is used as the means of violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than \$1,000 or imprisoned not more than two years, or both. *Sec. 22, Title XI, act of June 15, 1917 (40 Stat. 230).*

2857. False statements in time of war, inciting disloyalty, etc.—Whoever, when the United States is at war, shall willfully make or convey false reports

or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both. *Sec. 3, Title I, act of June 15, 1917 (40 Stat. 219).*

* * * *Provided, further,* That the Act entitled "An Act to amend section 3, title 1, of the Act entitled 'An Act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917 (Fortieth Statutes, page 217), and for other purposes," approved May 16, 1918 (Fortieth Statutes, page 553), be, and the same is hereby, repealed, and that said section 3 of said Act approved June 15, 1917, is hereby revived and restored with the same force and effect as originally enacted. *Joint Res. 64, March 3, 1921 (41 Stat. 1360).*

This section, as it was while the amendment of May 16, 1918, above referred to, was in force, read as follows:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operations or success of the military or naval forces of the United States, or to promote the success of its enemies or shall willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by or to the United States, and whoever, when the United States is at war, shall willfully cause, or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both: *Provided,* That any employee or official of the United States Government who commits any disloyal act or utters any unpatriotic or disloyal language, or who, in an abusive and violent manner criticizes the Army or Navy or the flag of the United States shall be at once dismissed from the service. Any such employee shall be dismissed by the head of the department in which the employee may be engaged, and any such official shall be dismissed by the authority having power to appoint a successor to the dismissed official."

Sec. 2 of said act of May 16, 1918, likewise repealed by the joint resolution of March 3, 1921, read as follows:

"That section one of Title XII and all other provisions of the Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June fifteenth, nineteen hundred and seventeen, which apply to section three of Title I thereof shall apply with equal force and effect to said section three as amended."

Notes of Decisions.

See also notes to 2238, ante.

Constitutionality.—The espionage act is constitutional. *Sugarmann v. U. S.* (1919), 249 U. S. 182, affirming (1917) 245 Fed. 604. The first amendment, while prohibiting legislation against free speech as such, was not intended to give immunity to every possible use of language. *Frohwerk v. U. S.* (1919), 249 U. S. 204.

Congress may punish under the ordinary rules of prosecution and without trenching upon the constitutional limitation as to treason, acts which are of a seditious nature and tend toward treason, but which are not of the direct character and super-dangerous degree which would meet the constitutional test and make them treason. *Wimmer v. U. S.* (C. C. A. 1920), 264 Fed. 11; certiorari denied, 253 U. S. 494. Thus the testimony of one witness, without corroboration, is sufficient to sustain a conviction under this section. *Bold v. U. S.* (C. C. A. 1920), 265 Fed. 581.

That this section makes criminal in time of war statements or utterances which in time of peace might be within the constitutional rights of a citizen does not render it unconstitutional. *Hickson v. U. S.* (C. C. A. 1919), 258 Fed. 867.

Construction of statute.—The section denounces three offenses: (1) The willful making or conveying of false reports while the United States is at war, with the intent to interfere with the operation or success of military or naval forces, etc.; (2) the attempt to cause insubordination, disloyalty, or mutiny in the military and naval forces of the United States; (3) the willful obstruction of the enlistment service of the United States, to the injury of the service or the United States—it being necessary to the consummation of the first two offenses that the United States be injured. *Shidler v. U. S.* (C. C. A. 1919), 257 Fed. 620.

Where all of these offenses are charged in one count of an indictment it is bad for duplicity. *U. S. v. Dembowski* (D. C. 1918), 252 Fed. 894.

An indictment charging a publisher with the commission of the second and third offenses set out in the above section need not allege that the statements in the

articles were false, whether such statements were false or not being immaterial. *Balbas v. U. S.* (C. C. A. 1919), 257 Fed. 17.

To constitute the offense it is sufficient that the accused did the acts charged, and that they were done willfully and with intent to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces, and it is not necessary to show that they produced the effect intended. *United States v. Kraft* (C. C. A. 1918), 249 Fed. 919; certiorari denied, 247 U. S. 520.

The provision of sec. 6 of the selective draft act, ante 2238, making it an offense to aid another to evade the requirements of that act, and the provision of this section, making it an offense to willfully obstruct the recruiting or enlistment service, are in pari materia; the facts which constitute an offense under the first provision also constitute an offense under the second, and the first provision being specific, and the second general, the first governs where the facts bring the offense within it. *Snitkin v. U. S.* (C. C. A. 1920), 265 Fed. 489.

An acquittal on one count for violating the espionage act is not inconsistent with a conviction on another count, where the first count contained the element of intent to interfere with the success of the military service, which did not enter into the offense alleged in the second count. *Hunkhouse v. U. S.* (C. C. A. 1920), 266 Fed. 977.

Referring to obstructing the recruiting or enlistment service, the word "obstruct" is not used as an equivalent of "prevent," but rather of "to make difficult," and, to warrant conviction for a violation of the said act, it need not be shown that the defendant's words or acts actually prevented recruiting or enlistment. *Deason v. United States* (C. C. A. 1918), 254 Fed. 259; certiorari denied, 249 U. S. 607; *Rhuberg v. U. S.* (C. C. A. 1919), 255 Fed. 865; *Reeder v. U. S.* (C. C. A. 1919), 262 Fed. 36; certiorari denied, 252 U. S. 581; compare *U. S. v. Hall* (D. C. 1918), 248 Fed. 150.

An attempt to obstruct the enlistment and recruiting service, though unsuccessful,

is a violation of this section. *Wessels v. U. S.* (C. C. A. 1919), 262 Fed. 389; certiorari denied, 253 U. S. 485.

The provision above, making it an offense to "willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or promote the success of its enemies" in time of war, includes in the prohibition only statements of fact which the utterer knows to be false, and mere criticism or expression of opinion relating to acts of the Government, expressed either in language or by cartoons, however immoderate in tone or harmful in effect, is not within the purview of the statute, and publications containing such matter can not lawfully be excluded from the mails, under 3012, post (of the espionage act), as in violation of such provision. *Masses Publication Co. v. Patten* (D. C. 1917), 244 Fed. 535; (C. C. A. 1917) 245 Fed. 102.

Indictment.—An indictment charging that defendants, in violation of the espionage act, conveyed false reports, with intent to interfere with the success of the military and naval forces of the United States, etc., but which did not specify the reports or to whom they were made, but merely followed the language of the statute, held insufficient, the statute itself being general. *Foster v. U. S.* (C. C. A. 1918), 253 Fed. 481; *Collins v. U. S.* (C. C. A. 1918), 253 Fed. 609.

An indictment charging that defendant in a named city and between certain months made seditious statements with the intent denounced by the espionage act, and thereby willfully, unlawfully, and knowingly attempted to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States, is insufficient, when there was nothing to connect the acts of defendant directly or indirectly with such military or naval forces. *Shlter v. U. S.* (C. C. A. 1919), 257 Fed. 724.

An indictment charging that the accused made nine statements violating the espionage act, but not specifying the circumstances under which they were made, held insufficient. *Fontana v. U. S.* (C. C. A. 1919), 262 Fed. 283.

An indictment under this section need not allege the existence of a state of war, as the courts take judicial notice of that fact. *Sonnenberg v. U. S.* (C. C. A. 1920), 264 Fed. 327. And of the further fact that it has been conducted with certain other nations. *Mead v. U. S.* (C. C. A. 1919), 257 Fed. 639.

An indictment charging conspiracy to violate the selective service act by prevent-

ing registration thereunder and by inducing desertion of those who had registered, is not duplicitous as charging two conspiracies, one of which could not by its nature originate until the other was terminated, since the intention to secure the desertion of those who had registered under the act and plans to effect that intention could have been formed before the day of registration. *Haywood v. U. S.* (C. C. A. 1920), 268 Fed. 795, 805.

Corroboration.—The evidence of one witness, without corroboration, is sufficient to sustain a conviction under this section. *Bold v. U. S.* (C. C. A. 1920), 265 Fed. 581.

Conspiracy.—A conspiracy to violate the espionage act, provided one or more of the conspirators do any act to effect the object of the conspiracy, is none the less criminal, if thus attempted to be carried into effect, merely because the conspirators failed to agree in advance upon the precise method in which the law shall be violated. *Pierce v. U. S.* (1920), 252 U. S. 239, affirming (1917) 245 Fed. 878.

A conspiracy to obstruct recruiting in violation of the espionage act is criminal even when no means have been specially agreed on to carry out the intent; and hence it is not an objection to an indictment that means are not alleged. *Frohwerk v. U. S.* (1919), 249 U. S. 204.

Conspiracy under the espionage act and under secs. 4 and 37, Penal Code (35 Stat. 1088), discussed and compared. *U. S. v. Stillson* (D. C. 1918), 254 Fed. 120; affirmed (1919), 250 U. S. 583; *Enfield v. U. S.* (C. C. A. 1919), 261 Fed. 141.

Sec. 6, Penal Code, ante 2849, denouncing conspiracies to use force to prevent, hinder, or delay the execution of any law of the United States, does not apply to forcible obstruction of the selective service act and the espionage act, the penal provisions of which constitute the specific directions for the punishment of all obstructions, forcible or otherwise, of the recruiting and enlistment service, and repeal, pro tanto, sec. 6, Penal Code, since Congress did not intend to inflict punishment twice for the same offense. *Haywood v. U. S.* (C. C. A. 1920), 268 Fed. 795.

Intent.—Intent is a necessary element in the offenses denounced by this section; those counts of the indictment which allege that the defendants intended, by the words used, to cause insubordination and obstruction of enlistment, state an offense; but those counts which merely state that defendants "attempted" or "willfully attempted" to obstruct the recruiting and enlistment service, do not state an offense. *U. S. v. Nearring* (D. C. 1918), 252 Fed. 223.

A person may be convicted of a conspiracy to obstruct recruiting by words of persuasion. *Schenck v. U. S.* (1919), 249 U. S. 47; *O'Connell v. U. S.* (1920), Sup. Ct., decided May 17, 1920.

It was not necessary to allege the means by which the conspiracy was to be carried out. A conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the intent. It is not necessary to allege intent, for intent to accomplish an object can not be alleged more clearly than by stating that parties conspired to accomplish it. *Frohwerk v. U. S.* (1919), 249 U. S. 204.

Mental attitude is implied in the words "support," "favor," and "oppose." The offense being one whose definition necessarily includes intent, indictment therefor need not allege intent, but only the acts done. *Schulze v. U. S.* (C. C. A. 1919), 259 Fed. 139, affirming 253 Fed. 377.

Whether a defendant, through drunkenness, was capable, at the time of the utterance, of entertaining the specific intent required by the espionage act, is a question for the jury. *Stenzel v. U. S.* (C. C. A. 1919), 261 Fed. 161.

Question whether defendant had knowledge of an article printed and circulated in a paper of which he was the owner, editor, and manager held one for the jury. *Bouldin v. U. S.* (C. C. A. 1919), 261 Fed. 674; certiorari denied, 253 U. S. 490.

Intent in making statements calculated to cause insubordination, disloyalty, etc., in military forces, a question for the jury. *Anderson v. U. S.* (C. C. A. 1920), 264 Fed. 75; certiorari denied, 253 U. S. 495.

A statement that the "government" was for the profiteers held to refer to the administration, and not to the system of polity or body of principles or rules by which the people are lawfully guided under the Constitution. *Stokes v. U. S.* (C. C. A. 1920), 264 Fed. 18.

Prior or other statements of accused.—In a prosecution for attempting to incite disloyalty and refusal of duty in the military service, evidence of statements made by defendant before the entrance of the United States into the war held admissible, as tending to show the state of mind and feeling of defendant. *Howenstine v. U. S.* (C. C. A. 1920), 263 Fed. 1.

In a prosecution for giving counsel and advice against enlistment, brought under this section, evidence of statements and conversations of defendant other than those charged in the indictment, while the United States was engaged in the World War, held admissible to show the intent with which the words charged were spoken,

when properly limited to such purpose. *Boehner v. U. S.* (C. C. A. 1920), 267 Fed. 562.

In a prosecution for uttering language intended to incite resistance to the United States, then at war, and supporting the cause of its enemies, in violation of the above section, evidence of statements by defendant after the beginning of the war but before the entry of the United States into the same, showing that he was then a strong supporter of Germany, held admissible, on the question of intent in using the language charged. *Albers v. U. S.* (C. C. A. 1920), 263 Fed. 27; *Seebach v. U. S.* (C. C. A. 1919), 262 Fed. 885; *Shidler v. U. S.* (C. C. A. 1919), 257 Fed. 620; *Herman v. U. S.* (C. C. A. 1919), 257 Fed. 601; certiorari denied, 251 U. S. 558; but see *Kammann v. U. S.* (C. C. A. 1919), 259 Fed. 192; *Grubl v. U. S.* (C. C. A. 1920), 264 Fed. 44.

And likewise of statement made before the passage of the espionage act. *Deason v. U. S.* (C. C. A. 1918), 254 Fed. 259; certiorari denied, 249 U. S. 607; *Equi v. U. S.* (C. C. A. 1919), 261 Fed. 53; certiorari denied, 251 U. S. 560; but see *Wolf v. U. S.* (C. C. A. 1919), 259 Fed. 388.

And likewise on a prosecution for conspiracy to induce violation of the selective service act, of statements and publications prior to the passage of said act. *Haywood v. U. S.* (C. C. A. 1920), 268 Fed. 795.

In a trial under this section for publishing and distributing seditious literature, admission of other publications distributed by defendants held not error, as limited to the question of intent. *Partan v. U. S.* (C. C. A. 1910), 261 Fed. 515; certiorari denied, 251 U. S. 561; *American Soc. Society v. U. S.* (C. C. A. 1920), 266 Fed. 212; certiorari denied, 254 U. S. —.

Held prejudicial error to admit evidence of threats made by the defendant against the President, unconnected with the acts with which he was charged. *Hall v. U. S.* (C. C. A. 1919), 256 Fed. 748.

In cases where there are eye or ear witnesses to the happening of an isolated transaction, and the sole question is whether it happened or did not happen, it is not proper or competent to permit the introduction of evidence of remote and disconnected matters, not charged in some good count in the indictment, to prove intent, where the element of intent is not involved in the crime charged. *Holz-macher v. U. S.* (C. C. A. 1920), 266 Fed. 979.

False newspaper publications.—An indictment against newspaper publishers, under the espionage act (40 Stat. 219), for making false reports with intent to obstruct

the military or naval forces, by altering original news dispatches before publication, is sustained by evidence showing that the dispatches were "lifted" from other publications and then altered so as to give aid to the enemy. *United States v. Schafer* (D. C. 1918), 254 Fed. 135; affirmed (1920), 251 U. S. 460, as to certain defendants.

An indictment alleged that defendants published a newspaper containing printed matter calculated and intended to induce eligible persons to refuse to enlist, and to induce persons liable to draft not to submit to registration and draft. Held, on demurrer, that the indictment states an offense under sec. 3, Title I of the espionage act (40 Stat. 217) as amended by act of May 16, 1918. *U. S. v. Prieth* (D. C. 1918), 251 Fed. 946.

Alleging false causes of war.—The publication of a pamphlet denouncing preparedness, inveighing against war, and characterizing military service as murder or attempted murder, is a violation of sec. 3 of the espionage act, since it tends to suppress patriotic feeling and to cause unrest and insubordination in the military forces. *United States v. Routin* (D. C. 1918), 251 Fed. 313.

The publication of a book that challenged the sincerity of America's war was a violation of this section. *U. S. v. Blinder* (D. C. 1918), 253 Fed. 978.

Seditious utterances.—An indictment alleging that defendant, in the presence of several persons in a saloon, stated to a soldier that the Kaiser could "lick" England and France, and would soon come to the United States and then "all you men will have to kiss the Kaiser's hands and feet," states an offense under sec. 3 of the espionage act of June 15, 1917. *U. S. v. Dembowski* (D. C. 1918), 252 Fed. 894.

In addressing a public audience, a Socialist lecturer said, in substance, that any person who enlisted in the Army of the United States for service in France would be used for fertilizer, and that was all he was good for, and that the women of the United States were nothing more or less than brood sows to raise children to get into the Army and be made into fertilizer. She was held to have violated sec. 3 of the espionage act of June 15, 1917 (40 Stat. 219), which provides that "Whoever, when the United States is at war, * * * shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished" as the act directs. The word "obstruct" means to hinder, impede, retard, or embarrass; and any efficient means likely to accomplish such a purpose

is within the condemnation of the statute. Mere words, without physical force, may be the most potent means of accomplishing those ends. It is not necessary for the Government to show that some particular person was induced not to enlist. The prohibited result will be presumed from the language and the circumstances. *O'Hare v. United States* (C. C. A. 1918), 253 Fed. 538; certiorari denied, 249 U. S. 598.

The defendant was indicted and convicted of violating the espionage act (40 Stat. 219), as amended by the act of May 16, 1918 (40 Stat. 553). The main theme of the defendant's speech was socialism, and he began by saying he had just returned from a visit to the workhouse, where three of their most loyal comrades were paying the penalty for their devotion, these three having been convicted of aiding and abetting another in failing to register for the draft. The records of these convictions were properly admitted in evidence to show what those grounds were in order to show what the defendant was talking about and to explain the true import and intent of the address. It was also proper to admit in evidence an "antiwar proclamation and program," coupled with testimony that about an hour before his speech the defendant had stated that he approved of that platform in spirit and in substance. It was proper to instruct the jury that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, and unless the defendant had the specific intent to do so in his mind. *Debs v. U. S.* (1919), 249 U. S. 211.

The publication of a pamphlet denouncing preparedness and characterizing military service as murder, held to be a violation of this section. *U. S. v. Boutin* (D. C. 1918), 251 Fed. 313.

It was not error to allow a witness to testify as to the impression made upon him by defendant's speech, though the witness could give only the substance of the speech. *Trelease v. U. S.* (C. C. A. 1920), 263 Fed. 886.

Language used by defendants in discussing the World War, the disasters of the Allies, and the successes of the enemy from day to day and week to week, in a shop used as a place of meeting, gossip, and discussion, which was obtained by the use of a dictaphone, held to support a conviction for favoring the cause of the enemy, and opposing the cause of the United States, in violation of the above section, and not within the First Amendment. *Schoborg v. U. S.* (C. C. A. 1920), 264 Fed. 1; certiorari denied, 263 Fed. 494.

Persons addressed.—An indictment alleged that the defendant willfully stated to diverse persons: "This is a rich man's war, and it is all a damn graft and swindle. * * * If you do not believe it, just look at the cost of wheat." Held, it does not allege a crime under this act, making it an offense willfully to make or convey false reports or statements with intent to interfere with the success of the military or naval forces, to cause insubordination in the Army and Navy, or obstruct recruiting; since it does not show that the words were communicated to persons whose hearing it was likely to produce the results sought to be avoided. The court said that since the prosecution could draw a new indictment which would not be open to any doubt, it seemed best not to proceed to trial on the one under consideration. *United States v. Schutte*, 252 Fed. 212.

A laborer, in the presence of other laborers at a construction camp, abused the United States and the President in grossly indecent language. Some of the laborers present were within draft age, but no part of the military or naval forces of the United States was present. No recruiting or enlistment was in process near the camp. Held, the facts presented are not sufficient to establish a willful attempt to obstruct recruiting or enlistment under sec. 3 of this act. *United States v. Mayer* (D. C. 1918), 252 Fed. 868.

In the presence of a school-teacher who was in class IV of the selective draft, the president of a district school board refused to display the flag on a schoolhouse, and said that he would just as soon see a pair of old trousers hanging over the schoolhouse as the national flag. It could not be legitimately inferred that the language would cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces, within the meaning of this section. *Von Bank v. U. S.* (C. C. A. 1918), 253 Fed. 641.

For language constituting an offense, when used to a man subject to military or naval service, see *White v. U. S.* (C. C. A. 1920), 263 Fed. 17; certiorari denied, 253 U. S. 496.

In a prosecution under sec. 3 of the espionage act for obstructing the enlistment and recruiting service and for causing or attempting to cause insubordination in the military and naval forces, it appeared that in the presence of two forest officers the defendant gave utterance to an indecent outburst because of a fancied grievance against the Government. The forest officers were at the time engaged in recruiting for the Engineer military service. This fact was unknown to the defendant, and the language

used by him was wholly unrelated to such recruiting service. A verdict of acquittal should have been directed. Where words only are relied on, they must be considered in connection with all the circumstances. *Doll v. United States* (C. C. A. 1918), 253 Fed. 646.

To constitute the offense of attempting to incite disloyalty and refusal of duty in the military service, within the above section, it is not necessary that the persons against whom the defendant's activities were directed should have been mustered into the military service, but it is sufficient if such persons were within the conscription act. *Howenstine v. U. S.* (C. C. A. 1920), 263 Fed. 1, 4, and cases cited.

That statements made by defendant having a tendency to cause disloyalty on the part of a man subject to call for military service did not have that effect, and that he afterwards attempted to enlist, held immaterial. *White v. U. S.* (C. C. A. 1920), 263 Fed. 17; certiorari denied (1920), 253 U. S. 406.

The language of this section, making it an offense willfully to attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, or willfully to obstruct the recruiting or enlistment service, is broad enough to include statements calculated to produce such results when made in presence of persons not in the military or naval forces, provided they are willfully made and with the intent specified. *Coldwell v. U. S.* (C. C. A. 1919), 256 Fed. 805; certiorari denied, 250 U. S. 601.

It is not necessary that the false reports and statements should be made in the presence of persons who are, or are liable to be, selected for military or naval service. *Kirchner v. U. S.* (C. C. A. 1918), 255 Fed. 301; certiorari dismissed, 250 U. S. 678; *Hickson v. U. S.* (C. C. A. 1919), 258 Fed. 867.

It is not necessary to show any particular person was prevented from enlisting. *O'Hare v. U. S.* (C. C. A. 1918), 253 Fed. 538; *Heynacher v. U. S.* (C. C. A. 1919), 257 Fed. 61; certiorari denied, 250 U. S. 674.

While an indictment charging an attempt to cause insubordination in the military service must allege that the words were uttered under such circumstances that they were in the course of events likely to reach members of the military forces, an indictment alleging publication of magazines calculated to cause insubordination and their distribution throughout New York and the rest of the United States is sufficient. *U. S. v. Eastman* (D. C. 1918), 252 Fed. 232.

Giving reasons, which at most are but matters of opinion, apparently honestly held, for not subscribing to the Liberty loan bonds and thrift stamps and contributing to the Red Cross fund, when requested for the same in the privacy of one's home and in the presence of nobody but a duly authorized committee, held not a violation of this section. *U. S. v. Pape* (D. C. 1918), 253 Fed. 270.

Statements made by defendant, in each case to a single person in the course of a private conversation relating to the World War, held merely expressions of opinion, not in violation of this section. *Sandberg v. U. S.* (C. C. A. 1919), 257 Fed. 643.

"Military or naval forces."—An instruction that, for the purposes of the statute, the persons designated by the selective service act of May 18, 1917, registered and enrolled under it, and thus subject to be called into the active service, were a part of the military forces of the United States, held correct. *U. S. v. Debs* (1919), 249 U. S. 211.

It is not necessary that the persons against whom the defendant's activities were directed should have been mustered into the military service of the United States. It is sufficient if they were within the draft provisions and subject to call. *Fairchild v. U. S.* (C. C. A. 1920), 265 Fed. 584; *Howenstine v. U. S.* (C. C. A. 1920), 263 Fed. 1; *Anderson v. U. S.* (C. C. A. 1920), 264 Fed. 75; certiorari denied, 253 U. S. 495; *Goldstein v. U. S.* (C. C. A. 1919), 258 Fed. 908; *Coldwell v. U. S.* (C. C. A. 1919), 256 Fed. 805; certiorari denied, 250 U. S. 661; compare *U. S. v. Hall* (D. C. 1918), 248 Fed. 150. A man within the ages subject to call was a part of the "military forces," though outside the ages then required to register, and though he had tried to enlist and been rejected. *White v. U. S.* (C. C. A. 1920), 263 Fed. 17; certiorari denied, 253 U. S. 496; compare *U. S. v. Mayer* (D. C. 1918), 252 Fed. 868.

It is a violation of this section to make false statements or reports to recruits for the Canadian forces. Such statements tend to interfere with the successful operations of the Canadian recruiting offices authorized in the United States by 2014, 2015, post. *Mead v. U. S.* (C. C. A. 1919), 257 Fed. 639.

The phrase construed as including the American Red Cross and the Y. M. C. A.

U. S. v. Nagler (D. C. 1918), 252 Fed. 217; reversed, 254 U. S. —; compare *Granzow v. U. S.* (C. C. A. 1919), 261 Fed. 172.

"Recruiting or enlistments service."—"Recruiting," as used in this section, means the gaining of fresh supplies for the forces, as well by draft as otherwise. *Schenck v. U. S.* (1919), 249 U. S. 47; *U. S. v. Prieth* (D. C. 1918), 251 Fed. 946.

The phrase, as here employed, signifies more than the mere induction into service of identified persons. It means the particular governmental function or establishment as a whole, and comprises the means, agencies, and instrumentalities which it adopts, or upon which it relies, to accomplish its object. *O'Hare v. U. S.* (C. C. A. 1918), 253 Fed. 538; certiorari denied, 249 U. S. 598; *Fairchild v. U. S.* (C. C. A. 1920), 265 Fed. 584.

State offenses.—Disloyal slanders or libels causing, or tending to cause, offenses against the State, can be prosecuted only in the State courts. *U. S. v. Hall* (D. C. 1918), 248 Fed. 150.

A State can make it an offense, *inter alia*, to utter contemptuous and slurring language about the flag and language calculated to bring the flag into contempt and disrepute, held constitutional and valid, as to offenses committed prior to the amendment of this section by the act of May 16, 1918. *Ex parte Starr* (D. C. 1920), 263 Fed. 145.

Motion pictures.—A moving picture calculated to sow discord between the United States and Great Britain during the World War held a violation of this section. *Goldstein v. U. S.* (C. C. A. 1919), 258 Fed. 908; *U. S. v. Motion Picture Film "The Spirit of '76'"* (D. C. 1917), 252 Fed. 946.

Corporations.—A corporation is within this section which declares a punishment for "whoever" in time of war wilfully obstructs the recruiting or enlistment service. *U. S. v. American Socialist Society* (D. C. 1918), 252 Fed. 223; (1919) 260 Fed. 885; affirmed (C. C. A. 1920), 266 Fed. 212.

Armistice.—The United States did not cease to be at war, on the signing of the armistice with Germany, as respects commission of the offenses under this section. *U. S. v. Steene* (D. C. 1920), 263 Fed. 130.

The war status at the time of the commission of the acts is a material consideration in determining charges of violation of the espionage act. *U. S. v. Strong*, (D. C. 1920), 263 Fed. 789.

2858. Conspiring to communicate with the enemy and to spread false information.—If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be pun-

ished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine. *Sec. 4, title I, act of June 15, 1917 (40 Stat. 219).*

See notes to 2857, ante.

• **2859. Harboring or concealing offenders.**—Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe or suspect, has committed, or is about to commit, an offense under this title shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than two years, or both. *Sec. 5, title I, act of June 15, 1917 (40 Stat. 219).*

2860. Proclamation of prohibited places.—The President in time of war or in case of national emergency may by proclamation designate any place other than those set forth in subsection (a) of section one hereof in which anything for the use of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purposes of this title: *Provided*, That he shall determine that information with respect thereto would be prejudicial to the national defense. *Sec. 6, title I, June 15, 1917 (40 Stat. 219).*

2861. Jurisdiction of courts-martial over spies, etc.—Nothing contained in this title shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial under sections thirteen hundred and forty-two, thirteen hundred and forty-three, and sixteen hundred and twenty-four of the Revised Statutes as amended. *Sec. 7, title I, act of June 15, 1917 (40 Stat. 219).*

2862. Jurisdiction of the United States over spies, etc.—The provisions of this title shall extend to all Territories, possessions, and places subject to the jurisdiction of the United States whether or not contiguous thereto, and offenses under this title when committed upon the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States and outside the territorial limits thereof shall be punishable hereunder. *Sec. 8, title I, act of June 15, 1917 (40 Stat. 219).*

CHAPTER 46.

TRAVEL AND COMMERCE IN TIME OF WAR.

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2863. Travel restricted in time of war.—That when the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;

(b) For any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this Act;

(c) For any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(c) For any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid. *Sec. 1, act of May 22, 1918 (40 Stat. 559).*

2864. Passports required for citizens in time of war.—That after such proclamation as is provided for by the preceding section has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport. *Sec. 2, act of May 22, 1918 (40 Stat. 559).*

2865. Penalties for unlawful travel in time of war.—That any person who shall willfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, imprisoned for not more than twenty years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States. *Sec. 3, act of May 22, 1918 (40 Stat. 559).*

2866. United States and person defined.—That the term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

The word "person" as used herein shall be deemed to mean any individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic. *Sec. 4, act of May 22, 1918 (40 Stat. 559).*

2867. Transporting enemies, etc.—That it shall be unlawful— * * *

(b) For any person, except with the license of the President, to transport or attempt to transport into or from the United States, or for any owner, master, or other person in charge of a vessel of American registry to transport or attempt to transport from any place to any other place, any subject or citizen of an enemy or ally of enemy nation, with knowledge or reasonable cause to believe that the person transported or attempted to be transported is such subject or citizen. *Sec. 5(b), act of Oct. 6, 1917 (40 Stat. 412).*

2868. Exports unlawful in time of war.—Whenever during the present war the President shall find that the public safety shall so require, and shall make proclamation thereof, it shall be unlawful to export from or ship from or take out of the United States to any country named in such proclamation any article or articles mentioned in such proclamation, except at such time or times, and under such regulations and orders, and subject to such limitations and exceptions as the President shall prescribe, until otherwise ordered by the President

or by Congress: *Provided, however,* That no preference shall be given to the ports of one State over those of another. *Sec. 1, title VII, act of June 15, 1917 (40 Stat. 225).*

For joint resolution providing that certain statutes, the operation of which is contingent upon the existence of a state of war, shall be construed as if the World War had ended on Mar. 3, 1921, see 2835, *ante*.

2869. Export of silver restricted during the World War.—That the provisions of Title VII of an Act approved June fifteenth, nineteen hundred and seventeen, entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," and the powers conferred upon the President by subsection (b) of section five of an Act approved October sixth, nineteen hundred and seventeen, known as the "Trading with the Enemy Act," shall, in so far as applicable to the exportation from or shipment from or taking out of the United States of silver coin or silver bullion, continue until the net amount of silver required by section two of this Act shall have been purchased as therein provided. *Sec. 9, act of April 23, 1918 (40 Stat. 537).*

For Title VII, act of June 15, 1917, see 2868, *ante*, and 2870, 2871, *post*.

For subsection (b), sec. 5, act of Oct. 6, 1917, see 2894, *post*.

Sec. 2, act of Apr. 23, 1918 (40 Stat. 536), provides for purchase of silver to maintain a balance in the Treasury against sales and payments of silver bullion.

See note to 2868, *ante*.

2870. Unlawful exportation in time of war.—Any person who shall export, ship, or take out, or deliver or attempt to deliver for export, shipment, or taking out, any article in violation of this title, or of any regulation or order made hereunder, shall be fined not more than \$10,000, or, if a natural person, imprisoned for not more than two years, or both; and any article so delivered or exported, shipped, or taken out, or so attempted to be delivered or exported, shipped, or taken out, shall be seized and forfeited to the United States; and any officer, director, or agent of a corporation who participates in any such violation shall be liable to like fine or imprisonment, or both. *Sec. 2, title VII, act of June 15, 1917 (40 Stat. 225).*

See note to 2868, *ante*.

Notes of Decisions.

Return of goods.—Where the United States libeled gold coin, on the ground that it had been delivered for export and shipment, from the United States, contra to this section, and to the presidential proclamation of Sept. 7, 1917, issued in pursuance thereof, held, as title 7 of this act,

the only law under which a forfeiture could be had in the case, does not provide for the giving of a bond and the release of the property, the return of the coin could not be allowed. *U. S. v. Fernandez (C. C. A. 1918), 254 Fed. 302.*

2871. Vessels detained in port in time of war.—Whenever there is reasonable cause to believe that any vessel, domestic or foreign, is about to carry out of the United States any article or articles in violation of the provisions of this title, the collector of customs for the district in which such vessel is located is hereby authorized and empowered, subject to review by the Secretary of Commerce, to refuse clearance to any such vessel, domestic or foreign, for which clearance is required by law, and by formal notice served upon the owners, master, or person or persons in command or charge of any domestic vessel for which clearance is not required by law, to forbid the departure of such vessel

from the port, and it shall thereupon be unlawful for such vessel to depart. Whoever, in violation of any of the provisions of this section, shall take, or attempt to take, or authorize the taking of any such vessel, out of port or from the jurisdiction of the United States, shall be fined not more than \$10,000 or imprisoned not more than two years, or both; and, in addition, such vessel, her tackle, apparel, furniture, equipment, and her forbidden cargo shall be forfeited to the United States. *Sec. 3, title VII, act of June 15, 1917 (40 Stat. 225).*

2872. Alien property custodian.—That the President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed \$5,000 per annum) of an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this Act. * * * *Sec. 6, act of Oct. 6, 1917 (40 Stat. 415).*

Notes of Decisions.

Suit against custodian.—A bill by an enemy alien, brought against the Alien Property Custodian, both individually and officially, must, where it solely complains of acts committed by him in his official capacity, be treated as one against him in

his official capacity, of which the district court has jurisdiction; the bill not being regarded as a suit against the United States. *Fischer v. Palmer (D. C. 1919). 259 Fed. 855.*

2873. Powers of the alien property custodian.— * * * The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided*, That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further*, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than \$10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. * * * *Sec. 12, act of Oct. 6, 1917 (40 Stat. 423), as amended by the act of March 28, 1918 (40 Stat. 460).*

Notes of Decisions.

Sale of enemy-owned patent to United States.—Under the above provision, the Alien Property Custodian can, for a fair and substantial consideration, sell any property, of which he becomes possessed, to the United States, but he can not sell such property for a merely nominal consideration. (1919) 31 Op. Atty. Gen. 463.

The sale of an enemy-owned patent by the Alien Property Custodian to the War Department acting for the United States could hardly affect an existing claim on account of the owner of the patent against

the United States for past infringements, and the matter would not seem to be one considered in computing the fair value of the patent which it is proposed shall be sold. *Id.*

If the United States becomes the owner of a patent it can exercise the usual proprietary rights of such an owner and can, therefore, enforce its rights against unlicensed users; can grant licenses; and can make assignments which carry with them full domination of the patent so far as rights thereunder are conveyed. *Id.*

2874. Trading with the enemy act.—That this Act shall be known as the "Trading with the enemy Act." *Sec. 1, act of Oct. 6, 1917 (40 Stat. 411).*

Notes of Decisions.

Validity.—Congress, by virtue of its war powers, can declare unlawful trading with the enemy, as it has done by this act. *Salamandra Ins. Co. v. N. Y. Life Ins. & Trust Co.* (D. C. 1918), 254 Fed. 832; *Fischer v. Palmer* (D. C. 1919), 259 Fed. 355.

Such act is not invalid as violating the Fifth Amendment, for there is no deprivation of the property of citizens, or friendly aliens, without due process of law.

Salamandra Ins. Co. v. N. Y. Life Ins. & Trust Co. (D. C. 1918), 254 Fed. 832.

The act is not unconstitutional because it provides no remedy for a review of the acts of the Alien Property Custodian in taking over property, except by suit under sec. 9 of the act, post 2899, authorizing suits by claimants within six months after the conclusion of peace. *Kahn v. Garvan* (D. C. 1920), 263 Fed. 909.

2875. Enemy defined.—That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy." * * * *Sec. 2, act of Oct. 6, 1917 (40 Stat. 411).*

Notes of Decisions.

Validity.—The provision of paragraph (a) of this section, declaring residents of Germany enemies, regardless of their citi-

zenship, was within the powers of Congress. *Kahn v. Garvan* (D. C. 1920), 263 Fed. 909.

2876. Ally of the enemy defined.— * * * The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of, a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

* * * *Sec. 2, act of Oct. 6, 1917 (40 Stat. 411).*

2877. Person defined.— * * * The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic. * * * *Sec. 2, act of Oct. 6, 1917 (40 Stat. 412).*

2878. The United States defined.— * * * The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof. * * * *Sec. 2, act of Oct. 6, 1917 (40 Stat. 412).*

2879. Beginning of the war defined.— * * * The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war. * * * *Sec. 2, act of Oct. 6, 1917 (40 Stat. 412).*

2880. End of the war defined.— * * * The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act. * * * *Sec. 2, act of Oct. 6, 1917 (40 Stat. 412).*

See also 2835, ante.

Notes of Decisions.

Effect of armistice.—Where the alien Property Custodian determined funds were alien property the signing of an armistice does not entitle adverse claimants to the fund on the theory that the war had ceased, no prior date appearing to have been declared by the President. *Salamandra Ins. Co. v. New York Life Ins. & Trust Co.*, 254 Fed. 852.

Termination of hostilities.—Held, that a state of war did not in law cease until the

ratification in April, 1899, of the treaty of peace. "A truce or suspension of armies," says Kent, "does not terminate the war, but it is one of the *commercium belli* which suspends its operations. * * * At the expiration of the truce, hostilities may recommence without any fresh declaration of war." 1 Kent, 159, 161. *Hijo v. United States*, 194 U. S. 323.

2881. Banks defined.— * * * The words "bank or banks," as used herein, shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of

the United States, or of any State of the United States. * * * *Sec. 2, act of Oct. 6, 1917 (40 Stat. 412).*

2882. To trade defined.— * * * The words "to trade," as used herein, shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with. *Sec. 2 act of Oct. 6, 1917 (40 Stat. 412).*

2883. Jurisdiction of the district courts over trading with the enemy.—That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary." *Sec. 17, act of Oct. 6, 1917 (40 Stat. 425).*

Secs. 128 and 238, act of Mar. 3, 1911 (36 Stat. 1183, 1157), were amended to read as set forth in sec. 2, act of Jan. 28, 1915 (38 Stat. 803, 804).

Notes of Decisions.

Court may aid custodian.—The Alien Property Custodian may apply, under this section, to a district court for aid in obtaining possession of property to which he is

entitled. *Garvan v. \$20,000 Bonds (C. C. A. 1920), 265 Fed. 477; In re Garvan (D. C. 1921), 270 Fed. 1002.*

2884. Jurisdiction over trading with the enemy in the Philippine Islands and the Canal Zone.—That the several courts of first instance in the Philippine Islands and the district court of the Canal Zone shall have jurisdiction of offenses under this Act committed within their respective districts, and concurrent jurisdiction with the district courts of the United States of offenses under this Act committed upon the high seas and of conspiracies to commit such offenses as defined by section thirty-seven of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine, and the provisions of such section for the purpose of this Act are hereby extended to the Philippine Islands and to the Canal Zone. *Sec. 18, act of Oct. 6, 1917 (40 Stat. 425).*

2885. Suspension of statutes of limitations in regard to trading with the enemy.—The running of any statute of limitations shall be suspended with reference to the the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the

said funds or property shall be released for the payment or satisfaction of such contract or obligation: *Provided, however,* That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law. *Sec. 8 (c), act of Oct. 6, 1917 (40 Stat. 419).*

2886. Notice of the President that a person is an enemy.— * * * Receipt of notice from the President to the effect that he has reasonable ground to believe that any person is an enemy or ally of enemy shall be *prima facie* defense to any one receiving the same, in any suit or action at law or in equity brought or maintained, or to any right or set-off or recoupment asserted by, such person and based on failure to complete or perform since the beginning of the war any contract or other obligation. In any prosecution under section sixteen hereof, proof of receipt of notice from the President to the effect that he has reasonable cause to believe that any person is an enemy or ally of enemy shall be *prima facie* evidence that the person receiving such notice has reasonable cause to believe such other person to be an enemy or ally of enemy within the meaning of section three hereof. *Sec. 7 (b), act of Oct. 6, 1917 (40 Stat. 417).*

Sec. 16, mentioned above, provides for the punishment of persons convicted of wilfully violating any of the provisions of this act or of any license, rule, or regulation issued thereunder, or of violating, neglecting, or refusing to comply with any order of the President issued in compliance with the provisions of this act.

2887. Trading with the enemy without license.—That it shall be unlawful—

(a) For any person in the United States, except with the license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy. *Sec. 3 (a), act of Oct. 6, 1917 (40 Stat. 412).*

See 2835, ante.

Notes of Decisions.

Legality.—The Government clearly has power to permit limited commercial intercourse with an enemy in time of war, and to impose such conditions thereon as it sees fit; the power is incident to the power to declare war and to carry it to a successful

conclusion. There is no doubt that with the concurrent authority of Congress, the President may exercise such power in his discretion. *Hamilton v. Dillin (1874), 21 Wall. 73.*

2888. Forwarding letters, etc., for enemies.—That it shall be unlawful— * * *

(c) For any person (other than a person in the service of the United States Government or of the Government of any nation, except that of an enemy or ally of enemy nation, and other than such persons or classes of persons as may be exempted hereunder by the President or by such person as he may direct), to send, or take out of, or bring into, or attempt to send, or take out of, or bring into the United States, any letter or other writing or tangible form of communication, except in the regular course of the mail; and it shall be unlawful for any person to send, take, or transmit, or attempt to send, take, or transmit out of the United States, any letter or other writing, book, map, plan, or other paper, picture, or any telegram, cablegram, or wireless message, or other form of communication intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy: * * * *Sec. 3 (c), act of Oct. 6, 1917 (40 Stat. 412).*

Notes of Decisions.

Construction.—The clause of this section inhibiting the bringing into or sending out of the United States communications, other than in the regular course of the mails, is not restricted to communications intended for enemies. *U. S. v. Welsh* (D. C. 1918), 250 Fed. 309.

While it is not a violation of this section to bring into the United States a coupon gold bond issued by an American corporation, which bore no communication

other than its proper printed contents, it is a violation to bring into the United States coupons for interest due on the bond of a friendly nation, where on the back of the coupon was stamped "C. L." and below it likewise "Lille," with certain figures, for the purpose of such writings not being disclosed. They might well contain a communication which it was the purpose of the act to exclude. *U. S. v. Van Werkhoven* (D. C. 1918), 250 Fed. 311.

2889. Authorized exportation.— * * * *Provided, however,* That any person may send, take, or transmit out of the United States anything herein forbidden if he shall first submit the same to the President, or to such officer as the President may direct, and shall obtain the license or consent of the President, under such rules and regulations, and with such exemptions, as shall be prescribed by the President. *Sec. 3(c), act of Oct. 6, 1917 (40 Stat. 413).*

2890. Restriction of importations during the World War.—Whenever during the present war the President shall find that the public safety so requires and shall make proclamation thereof it shall be unlawful to import into the United States from any country named in such proclamation any article or articles mentioned in such proclamation except at such time or times, and under such regulations or orders, and subject to such limitations and exceptions as the President shall prescribe, until otherwise ordered by the President or by Congress: *Provided, however,* That no preference shall be given to the ports of one State over those of another. *Sec. 11, act of Oct. 6, 1917 (40 Stat. 422).*

For joint resolution providing that certain statutes, the operation of which is contingent upon the existence of a state of war, shall be construed as if the World War had ended on Mar. 3, 1921, see 2835, ante.

2891. Unlicensed trading with the enemy without remedy.— * * * No conveyance, transfer, delivery, payment, or loan of money or other property, in violation of section three hereof, made after the passage of this Act, and not under license as herein provided shall confer or create any right or remedy in respect thereof; and no person shall by virtue of any assignment, indorsement, or delivery to him of any debt, bill, note, or other obligation or chose in action by, from, or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy have any right or remedy against the debtor, obligor, or other person liable to pay, fulfill, or perform the same unless said assignment, indorsement, or delivery was made prior to the beginning of the war or shall be made under license as herein provided, or unless, if made after the beginning of the war and prior to the date of passage of this Act, the person to whom the same was made shall prove lack of knowledge and of reasonable cause to believe on his part that the same was made by, from or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy; and any person who knowingly pays, discharges, or satisfies any such debt, note, bill, or other obligation or chose in action shall, on conviction thereof, be deemed to violate section three hereof: * * * *Sec. 7 (b), act of Oct. 6, 1917 (40 Stat. 417).*

2892. Suspension of restriction and prescription of regulations as to trading with the enemy.—That the President, if he shall find it compatible with the safety of the United States and with the successful prosecution of the war, may, by proclamation, suspend the provisions of this Act so far as they apply

to an ally of enemy, and he may revoke or renew such suspension from time to time; and the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe, to any person or class of persons to do business as provided in subsection (a) of section four hereof, and to perform any act made unlawful without such license in section three hereof, and to file and prosecute applications under subsection (b) of section ten hereof; and he may revoke or renew such licenses from time to time, if he shall be of opinion that such grant or revocation or renewal shall be compatible with the safety of the United States and with the successful prosecution of the war; and he may make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act; and the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct. * * * *Sec. 5(a), act of Oct. 6, 1917 (40 Stat. 415).*

Subsection (a) of sec. 4, referred to above, relates to enemy insurance companies doing business within the United States, and for the temporary continuance of other enemy business under Presidential license; sec. 3, referred to above, is found in 2887, 2867, 2888, 2889, ante, and 3018, post.

2893. Postponement of travel and commerce pending investigation.— * * * If the President shall have reasonable cause to believe that any act is about to be performed in violation of section three hereof he shall have authority to order the postponement of the performance of such act for a period not exceeding ninety days, pending investigation of the facts by him. *Sec. 5(a), act of Oct. 6, 1917 (40 Stat. 415).*

For sec. 3, mentioned above, see 2887, 2867, 2888, ante, and 3018, post.

2894. Transactions in foreign exchange, transfer of credits, etc.—That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency, transfers of credit in any form (other than credits relating solely to transactions to be executed wholly within the United States), and transfers of evidences of indebtedness or of the ownership of property between the United States and any foreign country, whether enemy, ally of enemy, or otherwise, or between residents of one or more foreign countries, by any person within the United States; and, for the purpose of strengthening, sustaining and broadening the market for bonds and certificates of indebtedness of the United States, of preventing frauds upon the holders thereof, and of protecting such holders, he may investigate and regulate, by means of licenses or otherwise (until the expiration of two years after the date of the termination of the present war with the Imperial German Government, as fixed by his proclamation), any transactions in such bonds or certificates by or between any person or persons: *Provided*, That nothing contained in this subdivision (b) shall be construed to confer any power to prohibit the purchase or sale for cash, or for notes eligible for discount at any Federal Reserve Bank, of bonds or certificates of indebtedness of the United States; and he may require any person engaged in any transaction referred to in this subdivision to furnish, under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed. *Sec. 5(b), act of Oct. 6, 1917 (40 Stat. 415), as amended by sec. 5, act of Sept. 24, 1918 (40 Stat. 966).*

2895. Contracts made prior to the beginning of war.— * * * *Provided*, That nothing in this Act contained shall prevent the carrying out, completion, or performance of any contract, agreement, or obligation originally made with or entered into by an enemy or ally of enemy where, prior to the beginning of the war and not in contemplation thereof, the interest of such enemy or ally of enemy devolved by assignment or otherwise upon a person not an enemy or ally of enemy, and no enemy or ally of enemy will be benefited by such carrying out, completion, or performance otherwise than by release from obligation thereunder. * * * *Sec. 7 (b), act of Oct. 6, 1917 (40 Stat. 417).*

Notes of Decisions.

A judgment for an alien enemy is objectionable only so far as it may give aid and comfort to the other side in the war.

A judgment recovered in the district court by an alien enemy before he became such, the satisfaction of which was delayed by the other party's appeal until the intervention of war, and affirmed with directions that the money be paid to the clerk of the trial court to be turned over to the Alien Property Custodian; and a motion to dismiss or suspend the action is correctly denied. *Birge-Forbes Co. v. Heye* (1919), 251 U. S. 317.

Since the right to confiscate enemy property on land was not generally recognized by the law, but exists solely by virtue of this section, which denies to any person any rights acquired by assignment of a chose in action by an alien enemy, unless such assignment was made prior to the beginning of the war, an assignment of corporate stock which, though not technically a chose in action, is property of a similar nature, made before the declaration of war, even with intent to avoid confiscation, was valid as against the Alien Property Custodian. *Stohr v. Wallace* (D. C. 1920), 269 Fed. 827.

2896. Property of aliens conveyed to the alien property custodian.—If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their

books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States. *Sep. 7 (c), act of Oct. 6, 1917 (40 Stat. 418), as amended by the act of Nov. 4, 1918 (40 Stat. 1020).*

As originally enacted, this subsection was as follows:

"If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

Notes of Decisions.

Constitutionality.—That the trading with the enemy act is constitutional, see *Salamandra Ins. Co. v. N. Y. Life Ins. & Trust Co.* (D. C. 1918), 254 Fed. 852; *Flischer v. Palmer* (D. C. 1919), 259 Fed. 355; *Kahn v. Garvan* (D. C. 1920), 263 Fed. 909.

Construction.—The language "any money, or other property owing * * * by, on account of, or on behalf of, or for the benefit of an enemy, * * *" does not cover an ordinary bank deposit. Where such a deposit is claimed both by an American citizen and the Alien Property Custodian, the latter claiming it as the property of an alien enemy, the bank may interplead the depositor and the custodian in a district court. *American Exch. Nat. Bank v. Palmer* (D. C. 1918), 256 Fed. 680.

The word "property," as here used, refers to a tangible res, or some evidence of debt, or share in property, and not to a mere chose in action. *Id.* (distinguishing *Salamandra Ins. Co. v. N. Y. Life Ins. & Trust Co.* (D. C. 1918), 254 Fed. 852).

"Money * * * owing * * * an enemy" certainly includes a debt. *Kohn v. Jacob and Joseph Kohn, Inc.* (D. C. 1920), 264 Fed. 253.

Power of Alien Property Custodian.—Under this act, the determination of the Alien Property Custodian, made in good faith, entitles him to the possession of alleged enemy property; and such possession will not be interfered with by injunction.

Salamandra Ins. Co. v. New York Life Ins. & Trust Co. (D. C. 1918), 254 Fed. 852.

Securities deposited by German insurance companies with trustees, as required by State laws, may be taken possession of by the Alien Property Custodian. *Garvan v. \$20,000 Bonds* (C. C. A. 1920), 265 Fed. 477.

In an action involving the recovery of a death benefit, the constitutionality of the "trading with the enemy act" (40 Stat. 411) was challenged. It was claimed that the taking by the custodian is without due process of law, and violative of the Fifth Amendment of the Federal Constitution. Said act provides, *inter alia*, that the President may require money or other property belonging to the enemy to be passed over to the Alien Property Custodian, and that any person, not an enemy, claiming any interest therein, may file a claim and bring suit in the district court against the custodian to establish his rights. The trading with the enemy act is a war measure. Its purpose is to confer upon the Chief Executive the power to seize the property of an enemy. The mere declaration of war did not confer that right. *Brown v. United States*, 8 Cranch, U. S. 110, 3 L. Ed. 504. But the Constitution, art. 1, sec. 8, cl. 11, gives Congress the power not only to declare war but also to "make rules concerning captures on land and water." And the scope of this provision is not confined to

captures made outside the territory of the United States. It extends as well to those made in this country, and it is immaterial whether the property is owned by an alien or a resident, or even a citizen of this country, if he be an enemy. *Miller v. United States*, 11 Wall. 268, 305, 306, 310-313, 20 L. Ed. 135.

A condition of war requires immediate, even drastic, action to prevent the use of enemy property against the Government. To secure such action the power to determine in the first instance whether property is or is not enemy property must necessarily be vested in some person, and by this act that person is the President. If

there be an error in the determination it may be corrected by the appeal to the courts provided in the act. This satisfies the constitutional requirement relating to due process of law. *Jagar v. Reclamation District No. 108*, 111 U. S. 701, 708; 4 Sup. Ct. 663, 28 L. Ed. 569; *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. U. S. 272, 276, 283, 284, 15 L. Ed. 372.

The so-called confiscation acts passed at the time of the Civil War were upheld. *Miller v. United States*, *supra*. So was an act passed in the present war, relating to disorderly resorts near camps. *United States v. Casey*, D. C., 247 Fed. 362.

2897. Voluntary transfer of property to the alien property custodian.—If not required to pay, convey, transfer, assign, or deliver under the provisions of subsection (c) hereof, any person not an enemy or ally of enemy who owes to, or holds for, or on account of, or on behalf of, or for the benefit of an enemy or of an ally of enemy not holding a license granted by the President hereunder, any money or other property, or to whom any obligation or form of liability to such enemy or ally of enemy is presented for payment, may, at his option, with the consent of the President, pay, convey, transfer, assign, or deliver to the alien property custodian said money or other property under such rules and regulations as the President shall prescribe. *Sec. 7 (d), act of Oct. 6, 1917 (40 Stat. 418).*

2898. Liability avoided by observing regulations as to trading with the enemy.—No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The alien property custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the alien property custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee. * * * *Sec. 7(c), act of Oct. 6, 1917 (40 Stat. 418).*

2899. Claims to property held by the alien property custodian.—(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and

held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—

(1) A citizen or subject of any nation or State or free city other than Germany or Austria or Hungary or Austria-Hungary, and is at the time of the return of such money or other property hereunder a citizen or subject of any such nation or State or free city; or * * * *Sec. 9, act of Oct. 6, 1917 (40 Stat. 919), as amended by act of June 5, 1920 (41 Stat. 977-978).*

(2) A woman who, at the time of her marriage, was a subject or citizen of a nation which has remained neutral in the war, or of a nation which was associated with the United States in the prosecution of said war, and who, prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary and that the money or other property concerned was not acquired by such woman either directly or indirectly, from any subject or citizen of Germany or Austria-Hungary subsequent to January 1, 1917.

(3) A woman who, at the time of her marriage, was a citizen of the United States and who, prior to April 6, 1917, intermarried with a subject or citizen of

Germany or Austria-Hungary, and that the money or other property concerned was not acquired by such woman, either directly or indirectly, from any subject or citizen of Germany or Austria-Hungary subsequent to January 1, 1917. *Sec. 9 (b), act of Oct. 6, 1917 (40 Stat. 419), as amended by act of Feb. 27, 1921 (41 Stat. 1147).*

(4) A citizen or subject of Germany or Austria or Hungary or Austria-Hungary and was, at the time of the severance of diplomatic relations between the United States and such nations, respectively, accredited to the United States as a diplomatic or consular officer of any such nation, or the wife or minor child of such officer, and that the money or other property concerned was within the territory of the United States by reason of the service of such officer in such capacity; or

(5) A citizen or subject of Germany or Austria-Hungary, who by virtue of the provisions of sections 4067, 4068, 4069, and 4070 of the Revised Statutes, and of the proclamations and regulations thereunder, was transferred, after arrest, into the custody of the War Department of the United States for detention during the war and is at the time of the return of his money or other property hereunder living within the United States; or

(6) A partnership, association, or other unincorporated body of individuals outside the United States, or a corporation incorporated within any country other than the United States, and was entirely owned at such time by subjects or citizens of nations, States, or free cities other than Germany or Austria or Hungary or Austria-Hungary and is so owned at the time of the return of its money or other property hereunder; or

(7) The Government of Bulgaria or Turkey, or any political or municipal subdivision thereof; or

(8) The Government of Germany or Austria or Hungary or Austria-Hungary, and that the money or other property concerned was the diplomatic or consular property of such Government—

then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian: *Provided*, That no person shall be deemed or held to be a citizen or subject of Germany or Austria or Hungary or Austria-Hungary for the purposes of this section, even though he was such citizen or subject at the time first specified in this subsection, if he has become or shall become, ipso facto or through exercise of option, a citizen or subject of any nation or State or free city other than Germany, Austria, or Hungary, (first) under the terms of such treaties of peace as have been or may be concluded subsequent to November 11, 1918, between Germany or Austria or Hungary (of the one part) and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part), or (second) under the terms of such treaties as have been or may be concluded in pursuance of the treaties of peace aforesaid between any nation, State, or free city (of the one part), whose territories, in whole or in part, on August 4, 1914, formed a portion of the territory of Germany or Austria-Hungary and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part). For the purposes of this section

any citizen or subject of a State or free city which at the time of the proposed return of money or other property of such citizen or subject hereunder forms a part of the territory of any one of the following nations: Germany, Austria, or Hungary, shall be deemed to be a citizen or subject of such nation. And the receipt of the said owner or of the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian shall be a full acquittance and discharge of the Alien Property Custodian or the Treasurer of the United States, as the case may be, and of the United States in respect to all claims of all persons heretofore or hereafter claiming any right, title, or interest in said property, or compensation or damages arising from the capture of such property by the President or the Alien Property Custodian: *Provided further, however*, That except as herein provided no such action by the President shall bar any person from the prosecution of any suit at law or in equity to establish any right, title, or interest which he may have therein.

(c) Any person whose property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof.

(d) Whenever a person, deceased, would have been entitled, if living, to the return of his money or other property hereunder, then his legal representative may proceed for the return of such property as provided in subsection (a) hereof: *Provided, however*, That the President or the court, as the case may be, before granting such relief shall impose such conditions by way of security or otherwise, as the President or the court, respectively, shall deem sufficient to insure that such legal representative will redeliver to the Alien Property Custodian such portion of the money or other property so received by him as shall be distributable to any person not eligible as a claimant under subsections (a) or (c) hereof.

(e) No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder.

(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

(g) This section shall not apply, however, to money paid to the Alien Property Custodian under section 10 hereof. *Sec. 9, act of Oct. 6, 1917 (40 Stat. 419), as amended by act of June 5, 1920 (41 Stat. 978-986),*

Notes of Decisions.

Change of status.—An alien enemy who, prior to the declaration of peace, became an alien friend, can only sue under this section in case the President fails to recognize his claim to the fund. *Kohn v. Jacob and Joseph Kohn, Inc.* (D. C. 1920), 264 Fed. 253.

Necessary parties.—In a suit by a person not an enemy, claiming an interest in the property in the hands of the Alien Property Custodian, the enemy owner, if a non-resident alien, is not a necessary party. *Spiegelberg v. Garvan* (D. C. 1919), 260 Fed. 302.

Continuance.—A suit, properly instituted by a German subject before the declaration of war, will not be dismissed thereafter, but suspended, on motion of the defendant, during the continuance of said war. *Plettenberg, Hothaas & Co. v. I. J. Kalmon & Co.* (D. C. 1917), 241 Fed. 606; *Stumpf v. A. Schreiber Brewing Co.* (D. C. 1917), 242 Fed. 80; *Speidel v. N. Barstow Co.* (D. C. 1917), 248 Fed. 621.

But an action should not be suspended where the plaintiff is an American corporation because all the shareholders are alien enemies. *Fritz Schulz, Jr., Co. v. Ralmus & Co.* (1917), 164 N. Y. Supp. 454.

A suit instituted under paragraph (a) of this section in which is alleged a cause of action against an alien enemy for proceeds of shipment of cotton will be continued until peace is declared, German firms claiming said proceeds as owners of the cotton under bills of lading which complainant alleges were forged. *City Nat. Bank v. Dresdner Bank* (D. C. 1919), 255 Fed. 225.

In a suit against a German alien enemy company for infringement of patent, an order will be made, on motion of its counsel, extending the time to answer until after the cessation of hostilities and the reopening of communication between the United States and Germany. *Kintner v. Hoch-Frequenz, etc., Telegraphie* (D. C. 1918), 256 Fed. 849.

A libel against an Italian vessel by a seaman who was signed in Italy and came with the vessel to an American port, and who, prior to suit, became a resident and declared his intention to become a citizen, will not be dismissed because he is a subject of Austria-Hungary, but will be continued until the termination of the war. *The Oropa* (D. C. 1919), 255 Fed. 132.

Under the act a writ of error to review a judgment in favor of an alien who became an alien enemy before the disposition thereof need not be held in abeyance, but the judgment being upheld, it should be modified, so as to direct payment to the clerk of the court, and by him to be transferred to the Alien Property Custodian, without prejudice to the rights of any person, not an alien enemy, to establish an interest therein. *Birge-Forbes Co. v. Heye* (C. C. A. 1918), 248 Fed. 636; affirmed (1920), 251 U. S. 317.

Dismissal.—Where a libel for damage to cargo against a German carrier was dismissed because of its absence caused by the war, the dismissal should have been without prejudice to any rights of the libellant or its correspondent. *Kuhnhold v. Netherlands-American Steam Nav. Co.* (C. C. A. 1920), 264 Fed. 320.

2900. Vessels belonging to enemies taken over by the United States.—That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise. *Sec. 1, Joint Res. 2, May 12, 1917* (40 Stat. 75).

2901. Fees on foreign letters patent for American inventions.—Any citizen of the United States, or any corporation organized within the United States, may, when duly authorized by the President, pay to an enemy or ally of enemy any tax, annuity, or fee which may be required by the laws of such enemy or ally of enemy nation in relation to patents and trade-marks, prints, labels, and

copyrights; and any such citizen or corporation may file and prosecute an application for letters patent or for registration of trade-mark, print, label, or copyright in the country of an enemy, or of an ally of enemy after first submitting such application to the President and receiving license so to file and prosecute, and to pay the fees required by law and customary agents' fees, the maximum amount of which in each case shall be subject to the control of the President. *Sec. 10(b), act of Oct. 6, 1917 (40 Stat. 420).*

2902. Manufacture of foreign inventions in the United States.— * * * (c) Any citizen of the United States or any corporation organized within the United States desiring to manufacture, or cause to be manufactured, a machine, manufacture, composition of matter, or design, or to carry on, or to use any trade-mark, print, label or cause to be carried on, a process under any patent or copyrighted matter owned or controlled by an enemy or ally of enemy at any time during the existence of a state of war may apply to the President for a license; and the President is hereby authorized to grant such a license, nonexclusive or exclusive as he shall deem best, provided he shall be of the opinion that such grant is for the public welfare, and that the applicant is able and intends in good faith to manufacture, or cause to be manufactured, the machine, manufacture, composition of matter, or design, or to carry on, or cause to be carried on, the process or to use the trade-mark, print, label, or copyrighted matter. The President may prescribe the conditions of this license, including the fixing of prices of articles and products necessary to the health of the military and naval forces of the United States or the successful prosecution of the war, and the rules and regulations under which such license may be granted and the fee which shall be charged therefor, not exceeding \$100, and not exceeding one per centum of the fund deposited as hereinafter provided. Such license shall be a complete defense to any suit at law or in equity instituted by the enemy or ally of enemy owners of the letters patent, trade-mark, print, label or copyright, or otherwise, against the licensee for infringement or for damages, royalty, or other money award on account of anything done by the licensee under such license, except as provided in subsection (f) hereof.

(d) The licensee shall file with the President a full statement of the extent of the use and enjoyment of the license, and of the prices received in such form and at such stated periods (at least annually) as the President may prescribe; and the licensee shall pay at such times as may be required to the alien property custodian not to exceed five per centum of the gross sums received by the licensee from the sale of said inventions or use of the trade-mark, print, label or copyrighted matter, or, if the President shall so order, five per centum of the value of the use of such inventions, trade-marks, prints, labels or copyrighted matter to the licensee as established by the President; and sums so paid shall be deposited by said alien property custodian forthwith in the Treasury of the United States as a trust fund for the said licensee and for the owner of the said patent, trade-mark, print, label or copyright registration as hereinafter provided, to be paid from the Treasury upon order of the court, as provided in subdivision (f) of this section, or upon the direction of the alien property custodian.

(e) Unless surrendered or terminated as provided in this Act, any license granted hereunder shall continue during the term fixed in the license or in the absence of any such limitation during the term of the patent, trade-mark, print, label, or copyright registration under which it is granted. Upon violation by the licensee of any of the provisions of this Act, or of the conditions of the

license, the President may, after due notice and hearing, cancel any license granted by him. * * * *Sec. 10, act of Oct. 6, 1917 (40 Stat. 420-421).*

2903. Recovery of royalties, etc., under foreign-owned letters patent.—The owner of any patent, trade-mark, print, label, or copyright under which a license is granted hereunder may, after the end of the war and until the expiration of one year thereafter, file a bill in equity against the licensee in the district court of the United States for the district in which the said licensee resides, or, if a corporation, in which it has its principal place of business (to which suit the Treasurer of the United States shall be made a party), for recovery from the said licensee for all use and enjoyment of the said patented invention, trade-mark, print, label, or copyrighted matter: *Provided, however,* That whenever suit is brought, as above, notice shall be filed with the alien property custodian within thirty days after date of entry of suit: *Provided, further,* That the licensee may make any and all defenses which would be available were no license granted. The court on due proceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree; and the said payment shall be in full or partial satisfaction of said judgment and decree, as the facts may appear; and if, after payment of all such judgments and decrees, there shall remain any balance of said deposit, such balance shall be repaid to the licensee on order of the alien property custodian. If no suit is brought within one year after the end of the war, or no notice is filed as above required, then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian. Upon entry of suit and notice filed as above required, or upon repayment of funds as above provided, the liability of the licensee to make further reports to the President shall cease.

If suit is brought as above provided, the court may, at any time, terminate the license, and may, in such event, issue an injunction to restrain the licensee from infringement thereafter, or the court, in case the licensee, prior to suit, shall have made investment of capital based on possession of the license, may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable. *Sec. 10 (f), act of Oct. 6, 1917 (40 Stat. 421).*

That no claim shall be made or action brought in respect of the use since August 1, 1914, up to the passage of this Act, by the Government of the United States, or by any persons acting on behalf of, or under contract with, or with the assent of the Government of the United States or of Governments or their representatives associated with the United States, under any patent rights owned in whole or in part since August 1, 1914, by an alien enemy, nor in respect of the use of any process during such period, or the sale, offering for sale, or use, at any time, of any products, articles, or apparatus whatsoever manufactured during such period to which such patent rights applied. *Sec. 7, act of Mar. 3, 1921 (41 Stat. 1314-1315).*

That nothing in this Act shall affect any Act done by virtue of the special measures taken during the war under legislative, executive, or administrative authority of the United States in regard to the rights of an enemy, or ally of an enemy, as defined by the Trading with the Enemy Act of October 6, 1917, in patents for inventions and designs. *Sec. 8, act of Mar. 3, 1921 (41 Stat. 1315).*

2904. *Inventions kept secret in time of war.*—Whenever the publication of an invention by the granting of a patent may, in the opinion of the President, be detrimental to the public safety or defense, or may assist the enemy or endanger the successful prosecution of the war, he may order that the invention be kept secret and withhold the grant of a patent until the end of the war: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the Commissioner of Patents that, in violation of said order, said invention has been published or that an application for a patent therefor has been filed in any other country, by the inventor or his assigns or legal representatives, without the consent or approval of the commissioner or under a license of the President.

When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the President above referred to shall tender his invention to the Government of the United States for its use, he shall, if he ultimately receives a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government. *Sec. 10 (i), act of Oct. 6, 1917 (40 Stat. 422).*

See 1016, 1018, *ante*.

CHAPTER 47.

FOREIGN RELATIONS.

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2905. Foreign government defined.—The words "foreign government," as used in this Act and in sections one hundred and fifty-six, one hundred and fifty-seven, one hundred and sixty-one, one hundred and seventy, one hundred and seventy-one, one hundred and seventy-two, one hundred and seventy-three, and two hundred and twenty of the Act of March fourth, nineteen hundred and nine, entitled "An Act to codify, revise, and amend the penal laws of the United States," shall be deemed to include any Government, faction, or body of insurgents within a country with which the United States is at peace, which Government, faction, or body of insurgents may or may not have been recognized by the United States as a Government. *Sec. 4, title VIII, act of June 15, 1917 (40 Stat. 226).*

2906. Issue of passports.—Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport. Clerks of United States courts, agents of the Department of State, or other Federal officials authorized, or who may be authorized, to take passport applications and administer oaths thereon, shall collect, for all services in connection therewith, a fee of \$1, and no more, in lieu of all

fees prescribed by any statute of the United States, whether the application is executed singly, in duplicate, or in triplicate. *Sec. 1, title IX, act of June 15, 1917 (40 Stat. 227).*

2907. Passport obtained through false statements.—Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both. *Sec. 2 title IX, act of June 15, 1917 (40 Stat. 227).*

2908. Fraudulent use of passports.—Whoever shall willfully and knowingly use, or attempt to use, any passport issued or designed for the use of another than himself, or whoever shall willfully and knowingly use or attempt to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport; or whoever shall willfully and knowingly furnish, dispose of, or deliver a passport to any person, for use by another than the person for whose use it was originally issued and designed, shall be fined not more than \$2,000 or imprisoned not more than five years, or both. *Sec. 3, title IX, act of June 15, 1917 (40 Stat. 227).*

2909. Forging or altering passports, etc.—Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be falsely made, forged, counterfeited, mutilated, or altered any passport or instrument purporting to be a passport, with intent to use the same, or with intent that the same may be used by another; or whoever shall willfully or knowingly use, or attempt to use, or furnish to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same, shall be fined not more than \$2,000 or imprisoned not more than five years or both. *Sec. 4, title IX, act of June 15, 1917 (40 Stat. 227).*

2910. False swearing to influence a foreign government to the injury of the United States.—Whoever, in relation to any dispute or controversy between a foreign government and the United States, shall willfully and knowingly make any untrue statement, either orally or in writing, under oath before any person authorized and empowered to administer oaths, which the affiant has knowledge or reason to believe will, or may be used to influence the measures or conduct of any foreign government, or of any officer or agent of any foreign government, to the injury of the United States, or with a view or intent to influence any measure of or action by the Government of the United States, or any branch thereof, to the injury of the United States, shall be fined not more than \$5,000 or imprisoned not more than five years, or both. *Sec. 1, title VIII, act of June 15, 1917 (40 Stat. 226).*

2911. Conspiracy to injure the property of a foreign government.—If two or more persons within the jurisdiction of the United States conspire to injure or destroy specific property situated within a foreign country and belonging to a foreign Government or to any political subdivision thereof with which the

United States is at peace, or any railroad, canal, bridge, or other public utility so situated, and if one or more of such persons commits an act within the jurisdiction of the United States to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined not more than \$5,000, or imprisoned not more than three years, or both. Any indictment or information under this section shall describe the specific property which it was the object of the conspiracy to injure or destroy. *Sec. 5, title VIII, act of June 15, 1917 (40 Stat. 226).*

2912. Extradition.—Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused. *R. S. 5275.*

2913. Commissions in foreign armies accepted by citizens of the United States.—Every citizen of the United States who, within the territory or jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, shall be fined not more than two thousand dollars and imprisoned not more than three years. *Sec. 9, Criminal Code, act of March 4, 1909 (35 Stat. 1089).*

Notes of Decisions.

Neutrality in general.—The decisions here collected relate to the general subject of neutrality and not merely to the above section.

Overt act constituting offense.—To constitute the offense of accepting and exercising a commission to serve against a foreign prince, State, etc., with whom the United States is at peace, under the first section of the act of Congress, some overt act under the commission must be done, such as raising men for the enterprise, collecting provisions, munitions of war, or any other act which shows an exercise of the authority which the commission was supposed to confer. *Charge to Grand Jury, Neutrality Laws (C. C. 1838), Fed. Cas. No. 18,265.*

Purpose and operation of neutrality laws in general.—The neutrality laws are not designed to interfere with commerce, even in contraband of war, but merely to prevent distinctly hostile acts, as against a friendly power, which tend to involve this country in war. *U. S. v. The Laurada (D. C. 1898), 85 Fed. 760.*

The neutrality laws of the United States, so called because their main purpose is to carry out the obligations imposed upon the United States while occupying a position

of neutrality toward belligerents, were intended to prevent offenses against friendly powers, whether they should or should not be engaged in war or in attempting to suppress revolt. (1895) 21 Op. Atty. Gen. 267.

Obligations and duties of Government and citizens in general.—The duty of the United States, when a state of war is declared or recognized by another country, is of its own motion to use diligence to discover and prevent within its borders the formation or departure of any military expedition intended to carry on or take part in such war. (1895) 21 Op. Atty. Gen. 267.

The fact that neutral individuals, instead of their Government, give aid to the belligerent, does not relieve the neutral Government from guilt; but the Government is innocent if the acts of individuals are such as, from their nature, make it impracticable or excessively burdensome for the Government to watch and prevent, or, if preventable without excessive burden, the Government used due diligence about their prevention. (1902) 24 Op. Atty. Gen. 15.

The fact that neutral merchants give aid to belligerents purely from motives of gain-seeking does not relieve their Gov-

ernment from its obligation to prevent such aid being given. (1902) 24 Op. Atty. Gen. 15.

It is no infraction of neutrality, for a neutral nation to carry its exports, not contraband, to a port of one of the belligerents. *Vasse v. Ball* (Pa. 1797), 2 Ball. 270, 1 L. Ed. 377.

Treaty provisions.—The provision of chap. 2, art. 11, of The Hague Treaty of Oct. 18, 1907, ratified by the United States Nov. 27, 1909 (36 Stat. 2324), requiring a neutral power which receives on its territory troops of a belligerent army to intern them, does not require legislation to make it effective. *Ex parte Toscano* (D. C. 1913), 208 Fed. 938.

The provision of chap. 2, art. 11, of The Hague Treaty of Oct. 18, 1907, ratified by the United States Nov. 27, 1909 (36 Stat. 2324), requiring a neutral power which receives on its territory troops of a belligerent army to intern them, does not violate any constitutional provision. *Id.*

Sale of vessel by belligerent to neutral.—A sale by a belligerent of a warship to a neutral in a neutral port is invalid by the law of nations. *The Georgia* (D. C. 1866), Fed. Cas. No. 5349.

Sale or shipment of contraband.—There is nothing in the laws of the United States, or in the laws of nations, that forbids neutrals from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure, which no nation is bound to prohibit, and which only exposes those engaged in it to the penalty of confiscation. *The Santissima Trinidad* (1822), 20 U. S. (7 Wheat.) 283, 5 L. Ed. 454.

While flour is not in general contraband of war it may be so if intended for military use by a belligerent or destined for a port of military or naval equipment, and being thus on the border line a proclamation of one of the Governments at war declaring it contraband is sufficient to impress it with that character. *Balfour, Guthrie & Co. v. Portland & Asiatic S. S. Co.* (D. C. 1909), 167 Fed. 1010.

A citizen of a neutral State may lawfully contract to carry contraband of war and his undertaking will be enforced by the courts of the neutral State. *Id.*

On indictment for violation of the neutrality laws by shipping arms to the State of Sonora in Mexico, the court would take judicial notice that such State was a large country and not a "place" in Mexico. *U. S. v. Albert Steinfeld & Co.* (D. C. 1913), 209 Fed. 904.

The mere sale or shipment of arms and munitions of war by persons in the United States to persons in Cuba is not a violation

of international law, however strong a suspicion there may be that they are to be used in an insurrection against the Spanish Government. Individuals in the United States have a right to sell such articles and ship them to whoever may choose to buy. (1895) 21 Op. Atty. Gen. 267.

The goods, and sometimes the ship carrying them, are subject to seizure by the Government within whose jurisdiction they may come, if its domestic laws or regulations are violated, but international law imposes no duty upon our Government with respect to such transactions. *Id.*

According to the weight of authority, the sale of contraband or war supplies to a belligerent is not unlawful, or a thing which a neutral nation must forbid to its citizens. *Id.*

A neutral nation must not give aid to one of the belligerents in the carrying on of war; but the carrying on of commerce with the belligerent nations in the manner usual before the war is not in itself the giving of such aid. *Id.*

The mere increased demand for warlike articles, and their consequent increased quantity in the commerce between the neutral and the belligerent countries, does not of itself make the commerce cease to be the same that was usual before the war. *Id.*

A belligerent may seize merchandise at sea involved in such commerce when it is the property of his enemy, or when it is composed of articles for direct and immediate use for warlike purposes. *Id.*

In determining whether a series of transactions which, in one aspect are commercial in character, are prohibited to the neutral nation and its people as being an aid to one of the belligerents in carrying on war against the other, the criteria are practically impossible to specify in advance. Among the points by which to be guided in determining that question are the systematic character of the transactions, their greater or less extensiveness, their persistence in time, their governmental character or the absence of it, their objects and results, and, principally, their relation, if any, to the prosecution of the war being carried on by the belligerent. *Id.*

The mere shipment or exportation of arms, in the way of commerce, to a country in which there are insurrectionary movements, does not seem to be prohibited by the statutes of the United States or by the law of nations. (1902) 24 Op. Atty. Gen. 25.

A neutral merchant is not obliged to regard the state of war between other nations; but, if he ships goods prohibited, they will be liable to seizure and condemnation. *Richardson v. Maine Fire & Marine Ins. Co.* (1809), 6 Mass. 102, 4 Am. Dec. 92.

Carrying contraband of war by the subjects of a neutral is not a sufficient cause for war against such neutral. *Id.*

The penalty of forfeiture, incurred by a neutral by carrying on a circuitous trade between the mother country and a colony, which is prohibited, attaches only during the prohibited voyage, and does not vitiate a subsequent lawful voyage. *Kemble v. Rhineland* (N. Y. 1802), 2 Johns. Cas. 130.

The neutrality act has been uniformly treated, by the executive departments and by judges of the United States courts, as embracing warlike enterprises set on foot in this country against a friendly power at peace with all the world. *U. S. v. Sullivan*, 9 N. Y. Leg. Obs., 257.

Neutrality, strictly speaking, consists in abstinence from any participation in a public, private, or civil war, and in impartiality of conduct toward both parties; but the maintenance unbroken of peaceful relations between two powers when the domestic peace of one of them is disturbed is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded

the recognition of belligerency; and, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith toward friendly nations requires their prevention. *The Three Friends*, 166 U. S., 1.

The organization, in one country or State, of combinations to aid or abet rebellion in another, or in any other way to act on its political institutions, is a violation of national amity and comity, and an act of semihostile interference with the affairs of other peoples. * * * But there is no municipal law to forbid and punish such combinations, either in the United States or Great Britain. 8 Op. Atty. Gen., 216.

The policy of this country is, and ever has been, a perfect neutrality and non-interference in the quarrels of other nations. 3 Op. Atty. Gen., 739.

The act of Apr. 30, 1818, like that of June 5, 1794, was intended to secure, beyond all risk of violation, the neutrality and pacific policy which they consecrate as our fundamental law. *Id.*, 741.

2914. Enlistment in foreign armies.—Whoever, within the territory or jurisdiction of the United States, enlists or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, State, colony, district, or people as a soldier or as a marine or seaman on board of any vessel of war, letter of marque, or privateer shall be fined not more than \$1,000 and imprisoned not more than three years. * * * *Sec. 10, Criminal Code, act of March 4, 1909 (35 Stat. 1089), as amended by act of May 7, 1917 (40 Stat. 39).*

Notes of Decisions.

Statutes prohibiting enlistments as matter of domestic or municipal right.—The acts of Congress prohibiting foreign enlistments is a matter of domestic or municipal right, as to which foreign Governments have no right to inquire, the international offense being independent of the question of the existence of a prohibitory act of Congress. (1855) 7 Op. Atty. Gen. 367.

Raising troops in the United States in general.—It is a settled principle of the law of nations that no belligerent can rightfully make use of the territory of a neutral State for belligerent purposes without the consent of the neutral Government. Hence the undertaking of a belligerent to enlist troops of land or sea in a neutral State, without the previous consent of the latter, is a hostile attack on its national sovereignty. (1855) 7 Op. Atty. Gen. 367.

Foreign minister enlisting troops.—A foreign minister who engages in the enlist-

ment of troops here for his Government is subject to be summarily expelled from the country, or, after demand of recall, dismissed by the President. (1855) 7 Op. Atty. Gen. 367.

Right of citizen to enter service of foreign Government.—A citizen of one country may enter the military service of a foreign Government without compromising the neutrality of his own. *Chaon v. Eighty-Nine Bales of Cocaine* (C. C. 1821), Fed. Cas. No. 2,568; *Juando v. Taylor* (D. C. 1818), Fed. Cas. No. 7,558.

Persons leaving country to enlist and transportation thereof.—It being lawful for individuals to go abroad to enlist, they may go in any number and in any way they see fit, by regular lines of steamers, by chartering a vessel, or in any other manner, either separately or associated; provided, always, that they do not go as a military expedition, or set on foot or begin within our juris-

diction a military expedition or enterprise, to be carried on from this country, or provide or prepare the means therefor. *U. S. v. O'Brien* (C. C. 1896), 75 Fed. 900.

It is not a crime under the statutes to leave this country with intent to enlist in foreign military service. *U. S. v. Kazinski* (D. C. 1855), Fed. Cas. No. 15,508.

It is not a crime to transport persons out of this country with their consent, who intend to enlist in foreign military service. *Id.*

To constitute a crime under the statute, such persons must be hired or retained to go abroad with intent to be so enlisted. *Id.*

It is not a crime or offense against the United States, under the neutrality laws, for individuals to leave the country with intent to enlist in foreign military service; nor is it an offense to transport persons out of the United States, and land them in foreign countries, when such persons intend to enlist in foreign armies. *U. S. v. Wiborg* (D. C. 1896), 73 Fed. 159, judgment modified *Wiborg v. U. S.* (1896), 16 Sup. Ct. 1127, 163 U. S. 632, 41 L. Ed. 289.

Engaging persons to go beyond limits of country to enlist.—It is an offense under act of Apr. 20, 1818, to engage a person to go beyond the limits of the United States to enlist in the service of a foreign country, where there is an intention that a consideration should be paid therefor. *U. S. v. Hertz* (C. C. 1855), Fed. Cas. No. 15,357.

For acts held to constitute a conspiracy to violate this section, see *U. S. v. Blair-*

Murdock Co. (D. C. 1915), 228 Fed. 77; reversed (C. C. A. 1917), 241 Fed. 217.

Enlistment of seamen in American port.—

The enlistment of seamen or others for marine service on Mexican steamers in the port of New York, they not being Mexicans transiently within the United States, is a clear violation of the second section of act of Apr. 20, 1818, to preserve and vindicate the neutrality of the United States, and the persons enlisted, as well as the officers enlisting them, are liable to the penalties thereby incurred. (1844) 4 Op. Atty. Gen. 336.

Native American naturalized under laws of France and serving on French vessel.—A native American who has become naturalized under the laws of France still remains subject to indictment in the United States courts for serving on a French privateer engaged in committing hostilities against a power at peace with the United States. *Williams' Case* (C. C. 1799), Fed. Cas. No. 17,708.

Enlistment for service of colony in rebellion.—*Quære*, whether a colony in a state of rebellion is embraced by act of 1794, prohibiting the enlistment of soldiers, etc., within the limits of the United States to enter the service of any foreign prince or State. *Chacon v. Eighty-Nine Bales of Cochineal* (C. C. 1821), Fed. Cas. No. 2,568.

A colony in rebellion is within the law of nations relating to the rights of neutrals, without regard to its status as a State. *Id.*

2915. Exemption of aliens from penalties for foreign enlistment.— * * * *Provided*, That this section shall not apply to citizens or subjects of any country engaged in war with a country with which the United States is at war, unless such citizen or subject of such foreign country shall hire or solicit a citizen of the United States to enlist or go beyond the jurisdiction of the United States with intent to enlist or enter the service of a foreign country. Enlistments under this proviso shall be under regulations prescribed by the Secretary of War. *Sec. 10, Criminal Code, act of March 4, 1909 (35 Stat. 1089), as amended by act of May 7, 1917 (40 Stat. 39).*

2916. Military or naval enterprise against a friendly government.—Whoever, within the territory or jurisdiction of the United States or of any of its possessions, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or who takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than \$3,000 or imprisoned not more than three years, or both. *Sec. 13, Criminal Code, act of March 4, 1909 (35 Stat. 1090), as amended by sec. 8, title V, act of June 15, 1917 (40 Stat. 223).*

Notes of Decisions.

See notes under 2014, ante, and 2921, post.

Duty of Government as to military expeditions.—The duty of the United States, when a state of war is declared or recognized by another country, is of its own motion to use diligence to discover and prevent within its borders the formation or departure of any military expedition intended to carry on or take part in such war (1895) 21 Op. Atty. Gen. 267.

Statute as creating two offenses.—This section creates two offenses: (1) Setting on foot, within the United States, a military expedition, to be carried on against any power, etc., with whom the United States is at peace; (2) providing the means for such an expedition. *U. S. v. Hart* (D. C. 1897), 78 Fed. 868; judgment affirmed, *Hart v. U. S.* (1898), 84 Fed. 799, 28 C. C. A. 612.

Meaning of "expedition" and "enterprise."—The word "enterprise" is somewhat broader than the word "expedition"; and although the words are synonymously used, it would seem that under the rule that every word should be presumed to have some force and effect, the word "enterprise" was employed to give a slightly wider scope to the statute. *Wiborg v. U. S.* (1896), 163 U. S. 632, 650.

The sending of only one spy from the United States to England, for the benefit of Germany, then at war with Great Britain, constitutes a "military enterprise," as distinguished from a "military expedition." *U. S. v. Sander* (D. C. 1917), 241 Fed. 417; see also *U. S. v. Chakrabarty* (D. C. 1917), 244 Fed. 287.

A single individual may violate this section, by providing or preparing the means for a military expedition referred to in the statute. *U. S. v. Ram Chandra* (D. C. 1917), 254 Fed. 635.

The word "enterprise," as used in this section, means an undertaking of hazard; an arduous attempt. *U. S. v. Ybanez* (C. C. 1892), 53 Fed. 530.

The phrase "set on foot," as used in this section, means to arrange; place in order; set forward; put in the place of being ready. *U. S. v. Ybanez* (C. C. 1892), 53 Fed. 536.

The word "begin," as used in this section, means to do the first act; to enter on. *Id.*

Beginning or setting expedition on foot in general.—The carrying on from the United States of an expedition against a neutral power is an offense, though the association originated in another country. *Ex parte Needham* (C. C. 1817), Fed. Cas. No. 10,080.

Any combination of individuals to carry on an expedition is "setting it on foot," within the meaning of the statute, and the contribution of money or anything else which shall induce such combination may be a beginning of the enterprise. Charge to Grand Jury, Neutrality Laws (C. C. 1851), Fed. Cas. No. 18,267.

Providing and preparing means for expedition.—This section applies to the providing or preparing of means of transportation for such an expedition or enterprise. *Wiborg v. U. S.* (1896), 16 Sup. Ct. 1127, 1133, 163 U. S. 632, 41 L. Ed. 289, modifying judgment *U. S. v. Wiborg* (D. C. 1896), 73 Fed. 159.

One who provides the means for transporting a military expedition on any part of its journey, with knowledge of its ultimate destination and unlawful character, is punishable under R. S. 5286 (embodied herein). *Hart v. U. S.* (1898), 84 Fed. 799, 28 C. C. A. 612, affirming *U. S. v. Hart* (D. C. 1897), 78 Fed. 868.

Providing means for carrying a known military expedition to an island over which the United States has jurisdiction, as one stage of its journey, with knowledge of its final destination, is an offense under the statute. *Id.*

To constitute the offense of beginning or setting on foot a military expedition against a friendly power, within this section, it is not necessary that the expedition shall be actually set on foot. It is sufficient if such preparations are made for it as show an intent to set it on foot. Charge to Grand Jury, Neutrality Laws (C. C. 1838), Fed. Cas. No. 18,265.

To "provide or prepare the means for any military expedition or enterprise," within the meaning of this section such preparation must be made as shall aid the expedition. The contribution of money, clothing for the troops, provisions, arms, or any other contribution which shall tend to forward the expedition or add to the comfort or maintenance of those engaged in it, is a violation of this provision. Charge to Grand Jury, Neutrality Laws (C. C. 1838), Fed. Cas. No. 18,265; *Id.* (C. C. 1851), Fed. Cas. No. 18,267; *Id.* (C. C. 1859), Fed. Cas. No. 18,268.

If the means provided were to be used only on the occurrence of a future contingent event, or if they were to be used at a time and under circumstances when their use would not violate the law, there is no offense. *U. S. v. Lumsden* (C. C. 1856), Fed. Cas. No. 15,641.

To provide the means for such an expedition implies that such means shall be actually furnished and brought together for the criminal purpose. *Id.*

The captain and mate of a United States vessel, who, knowing the character of their cargo and its intended purpose, transported arms from a port within the United States to a foreign port, together with men and stores to be used in a military expedition against a people at peace with the United States, are guilty of violating this section. *U. S. v. Rand* (D. C. 1883), 17 Fed. 142.

To convict of providing means for a military expedition, etc., it must be proved (1) that a military expedition was organized in this country, and (2) that defendant, in the district of his trial, provided means for it with knowledge of its character. *U. S. v. Hart* (D. C. 1897), 78 Fed. 868; judgment affirmed *Hart v. U. S.* (1898), 84 Fed. 799, 28 C. C. A. 612.

Providing the means of transportation for a known military enterprise to be carried on from the United States against Spanish rule in Cuba is an offense, under this section. *U. S. v. Murphy* (D. C. 1898), 84 Fed. 609.

Furnishing money to be used on behalf of the people of another country in a struggle for independence, provided it is not to be used in organizing and fitting out with arms and ammunitions of war expeditions into and against any foreign country or its commerce, is not in contravention of the neutrality laws. *Batley v. O'Mahony* (1871), 33 N. Y. Super. Ct. (1 Jones & S.) 239, 10 Abb. Prac. (N. S.) 270.

Military character of expedition.—It was proper for the court to charge that any combination of men organized in the United States to go to Cuba, to make war upon its Government, provided with arms and ammunition (the United States being at peace with Cuba) constituted a military expedition; and that it was not necessary that the men should be drilled, put in uniform, or prepared for efficient service; but that it was sufficient that they should have combined and organized in the United States to go to Cuba, and make war on a foreign Government, and should have provided themselves with the means of doing so. *Wiborg v. U. S.* (1896), 16 Sup. Ct. 1127, 163 U. S. 632, 41 L. Ed. 289, affirming *U. S. v. Wiborg* (D. C. 1896), 73 Fed. 159.

Under this section the military character of an expedition against a nation at peace with the United States may be determined by the designation of officers or leaders, the organization of men in regiments or companies or otherwise, and the purchase

of military stores; but no particular number of men is necessary to complete the crime, nor is it necessary that such an expedition should actually set out, for the crime is completed by the mere organization, or any other step in the inception thereof. *U. S. v. Ybanes* (C. C. 1892), 53 Fed. 536.

In order to constitute a military expedition, within the meaning of this section, it is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized, according to the tactics, as infantry, artillery, or cavalry; but it is sufficient that they shall have combined or organized, within the United States, to go to the foreign territory and make war on the foreign Government, either as an independent body, or in connection with others, and have provided themselves with the means of doing so; and such provision, as by arming, etc., is itself probably not essential. *U. S. v. Wiborg* (D. C. 1896), 73 Fed. 159; judgment modified, *Wiborg v. U. S.* (1896), 16 Sup. Ct. 1127, 163 U. S. 632, 41 L. Ed. 289.

A military expedition, in the meaning of the statute, comprehends any combination of men, organized in this country, however imperfectly, and provided with arms and ammunition, to go to a foreign country, and make war on its government; and it is immaterial whether the expedition intends to make war as an independent body, or in combination with others in the foreign country. *U. S. v. Hart* (D. C. 1897), 78 Fed. 868; judgment affirmed, *Hart v. U. S.* (1898), 84 Fed. 799, 28 C. C. A. 612.

A combination of a number of men in the United States, with a common intent to proceed in a body to a foreign territory, and engage in hostilities, either by themselves or in cooperation with others, against a power with whom the United States is at peace, constitutes a military expedition, when they actually proceed from the United States, whether they are then provided with arms, or intend to secure them in transit. It is not necessary that all the persons shall be brought in personal contact with each other in the United States, or that they shall be drilled, uniformed, or prepared for efficient service. *U. S. v. Murphy* (D. C. 1898), 84 Fed. 609.

An indictment for conspiracy under this section which alleged that it was the intention of the defendants to blow up certain railroad tunnels, railroads, bridges, trains, and ships engaged in transporting munitions of war to certain-named belligerents held insufficient, as the charge that defendants conspired to set on foot or provide means for a military enterprise was

a mere conclusion and an attempt to destroy such tunnels, etc., was not necessarily a military enterprise, especially since it was not even alleged that the purpose of such destruction was to prevent the transportation of munitions of war. *U. S. v. Bopp* (D. C. 1916), 230 Fed. 723.

Necessity of hostile intention.—To constitute the offense of beginning, setting on foot, or providing the means for a military expedition against a nation with whom the United States is at peace, under act of Apr. 20, 1818, sec. 6, there must be a hostile intention connected with the act of beginning or setting on foot the expedition. *U. S. v. O'Sullivan* (D. C. 1851), Fed. Cas. No. 15,975.

When connected with such hostile intent the crime is completed either by beginning or setting on foot an expedition, or providing or procuring the means therefor. *Id.*

Overt or definite act.—The overt act is not an invasion of a foreign country, but taking the incipient steps in the enterprise, such as providing the means for the expedition, furnishing munitions of war or money, enlisting men, and, in short, doing anything and everything that is necessary to the commencement and prosecution of the enterprise. Charge to grand jury, Neutrality Laws (C. C. 1851), Fed. Cas. No. 18,266; *Id.* (C. C. 1851), Fed. Cas. No. 18,267.

The offense of beginning or setting on foot, or providing or preparing the means for, a military expedition against a friendly State, under this section, is not complete without some overt or definite act. *U. S. v. Lumsden* (C. C. 1856), Fed. Cas. No. 15,641.

Mere words spoken or written, though indicative of the most determined purpose to do the forbidden acts, will not constitute an offense under the statute. *Id.*

Persons liable.—Mates of a foreign vessel sailing from a United States port, who at the time of sailing did not know that the vessel was to carry an expedition in violation of the neutrality law, and did not learn thereof until they met beyond the 3-mile limit another vessel containing men and arms, are not guilty of the offense. *Wiborg v. U. S.* (1896), 16 Sup. Ct. 1127, 163 U. S. 632, 41 L. Ed. 289, modifying judgment *U. S. v. Wiborg* (D. C. 1896), 73 Fed. 159.

Knowledge and approbation of the President.—The fact that defendant set on foot a military expedition in violation of act of June 5, 1794, sec. 5, with the knowledge and approbation of the President, is no justification, as the President has no authority to set on foot a military expedition

against a nation with which the United States is at peace. *U. S. v. Smith* (C. C. 1806), Fed. Cas. No. 16,342.

Necessity of expedition starting for destination.—To constitute the offense, it is not necessary that the expedition should start for its destination. *U. S. v. O'Sullivan* (D. C. 1851), Fed. Cas. No. 15,975.

Necessity of expedition being consummated with deviation of course.—An expedition, to be within act of June 5, 1794, sec. 5, need not to have been consummated without deviation of course. It is sufficient if it was begun and the means prepared to be carried on from the United States, though the vessel, at the identical time of sailing, was not in complete readiness for hostile engagements. *U. S. v. Smith* (C. C. 1806), Fed. Cas. No. 16,342a.

Expedition originating in United States or abroad.—It is an offense against the act passed 1794 (1 Stat. 381) to concert an expedition from the United States to commit hostilities against a power at peace with the United States; and it is unimportant that such association originated beyond seas, if the expedition was carried on from hence. *Ex parte Needham* (C. C. 1817), Fed. Cas. No. 10,080.

It is unimportant whether the persons engaged in such a purpose engage the whole vessel to themselves, or depart from the United States as passengers. *Id.*

Upon an indictment charging defendants with beginning or setting on foot or providing means for a military expedition or enterprise from this country against Spain in aid of Cuban insurgents by the steamer *Bermuda*, where the steamer was arrested before she sailed, after taking on board about 60 men neither armed, equipped, nor officered, and no proof except the doubtful testimony of one witness belonging to the party of any other intent on the part of the men except to go to Cuba and join the army after arrival there, the jury were instructed: (1) That it is no offense for individuals, singly or in company, and in any way they choose, to go abroad for the mere purpose of enlisting in a foreign army, provided they do not enlist in, or set on foot here, or prepare any military expedition or enterprise; (2) that such an expedition or enterprise, to come within the statute as one "carried on from this country," must consist of some body of persons designing to act together in a military way, and possess at the start from this country some element of a military character beyond the mere intent to enlist individually after arrival in Cuba; (3) that it is not necessary that it should possess all the elements of a military body at the start, but it is sufficient if there was a combination of men for that purpose,

with the intent that it should become so before reaching the scene of action; (4) that it is not unlawful to transport peaceably and by an unarmed vessel a body of men as individuals to Cuba who wish to enlist there, and such transportation does not constitute a providing of the means for a military expedition or enterprise, unless there is some enlistment or combination or agreement of the men to act in some way as a military body, or the use of some military force is contemplated, if necessary, in order to reach the insurgent army. *U. S. v. Hart* (C. C. 1896), 74 Fed. 724.

It is not an offense against the laws of the United States to transport to a foreign country men intending to enlist in foreign armies, and munitions of war, provided the persons transported have not combined and organized themselves, in the United States, to make war on a foreign Government. *U. S. v. Wiborg* (D. C. 1896), 73 Fed. 159; judgment modified, *Wiborg v. U. S.* (1896), 16 Sup. Ct. 1127, 163 U. S. 632, 41 L. Ed. 280.

It is lawful for men, many or few, to go from this country as individuals, even by the same vessel, and though that vessel also carries arms as merchandise, for the purpose of joining a body of insurgents to fight against a foreign Government. *U. S. v. Hart* (D. C. 1897), 78 Fed. 868; judgment affirmed, *Hart v. U. S.* (1898), 84 Fed. 799, 28 C. C. 612.

Expedition against nation with which war is inevitable.—The setting on foot or providing the means of a military expedition against a nation with which the United States is at peace is an offense, notwithstanding it appear that war is inevitable, unless the prosecution of the expedition depended upon its taking place. *U. S. v. Burr* (C. C. 1807), Fed. Cas. No. 14,694a.

A citizen can not make the election, or anticipate his Government's making the election, to consider as an act of war the taking possession by another nation of contested territory, arising out of a dispute as to boundaries. *Id.*

Expedition against friendly power at peace.—Act June 5, 1794, extends to war-like expeditions from this country, though not intended to aid one belligerent against another, but directed against a friendly power at peace with all the world. *U. S. v. O'Sullivan* (D. C. 1851), Fed. Cas. No. 15,974; *Id.* (D. C. 1851), Fed. Cas. No. 15,975.

It is no defense to an indictment under this section that the Government of the friendly power against whom the expedition was directed had not been recognized by the United States. *De Orozco v. U. S.* (C. C. A. 1916), 237 Fed. 1008.

Purchasing arms and ammunition and placing them on board vessel.—When a party of insurgents, already organized and carrying on war against the Government of a foreign country, send a vessel to procure arms and ammunition in the United States, the act of purchasing such arms and ammunition, and placing them on board the vessel, is not within the scope of this section, prescribing a punishment for every person who, within the limits or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, "to be carried on from thence." *U. S. v. Trumbull* (D. C. 1891), 48 Fed. 99.

Shipping and transportation, and leaving country to enlist in foreign service.—It is no offense against the laws of the United States to transport, from this to a foreign country, arms, ammunition, and materials of war, either alone or together, in the same ship, with men who intend to enlist, provided they are not a part of or in aid of any military expedition or enterprise set on foot in this country. In such case the persons transported and the shipper and transporter only run the risk of capture, and the seizure of such arms and munitions by the foreign power against which the arms are intended to be used. *U. S. v. O'Brien* (C. C. 1896), 75 Fed. 900.

The transportation of goods for commercial purposes only and the carriage of persons separately, though their individual design may be to enlist in a foreign strife, are not prohibited by our law if the transportation is without any features of a military character. Indications of a military operation or of a military expedition are concert and unity of action, organization of men to act together, the presence of weapons, and some form of command or leadership. *U. S. v. Nunez* (C. C. 1896), 82 Fed. 599.

This section does not prohibit the shipping of arms, ammunition, or military equipments to a foreign country, nor forbid one or more individuals, singly or in unarmed association, from leaving the United States to join in any military operations being carried on between other countries or different parties in the same country. *U. S. v. Pena* (D. C. 1895), 69 Fed. 983.

It is not an offense against the laws of the United States to transport arms, ammunition, and munitions of war from the United States to a foreign country, whether they are to be used in war or not, and the shipper or transporter only runs the risk of capture, seizure, etc. *U. S. v. Wiborg* (D. C. 1896), 73 Fed. 159; judgment modified, *Wiborg v. U. S.* (1896),

16 Sup. Ct. 1127, 163 U. S. 632, 41 L. Ed. 289.

Proof that a vessel transported from Aspinwall to the coast of Cuba men, arms, and munitions of war, destined to aid the Cuban insurgents, is insufficient, by itself, to warrant proceedings against such vessel for violation of the neutrality law of the United States. (1871), 13 Op. Atty. Gen. 541.

Venue of offense.—If the officers of a foreign vessel, sailing from a United States

port, which, after passing the 3-mile limit, took aboard men and arms for an expedition in violation of the neutrality law, had prepared for sailing, and had taken aboard extra boats while in port, with knowledge of the proposed expedition, they were guilty of the crime in the district from which they sailed. *Wiborg v. U. S.* (1896), 16 Sup. Ct. 1127, 1133, 163 U. S. 632, 41 L. Ed. 289, modifying judgment *U. S. v. Wiborg* (D. C. 1896), 73 Fed. 159.

2917. Furnishing armed vessels for a foreign nation.—Whoever, within the territory or jurisdiction of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or whoever issues or delivers a commission within the territory or jurisdiction of the United States for any vessel, to the intent that she may be so employed, shall be fined not more than ten thousand dollars and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer and the other half to the use of the United States. *Sec. 11, Criminal Code, act of March 4, 1909 (35 Stat. 1090).*

Notes of Decisions.

Offense under statute in general.—As to what constitutes an illegal outfit to cruise against a belligerent power at peace with the United States, see *The Phœbe Anne* (1796), 3 Dall. 319, 1 L. Ed. 618; *Den Onzekeren* (1796), 3 Dall. 285, 290, 1 L. Ed. 605.

A capture made by a vessel fitted out and armed in an American port in contravention of the statutes of neutrality, and proceeding thence on a cruise, can not be justified, whether the vessel was with or without a commission. *The Santa Maria* (1822), 20 U. S. (7 Wheat.) 490, 5 L. Ed. 505.

To constitute the offense against this section the vessel must not only have been fitted out with intent to be employed against a friendly nation but actually armed for that purpose. *U. S. v. Skinner* (C. C. 1818), Fed. Cas. No. 16,309.

Until it appears by information and conviction thereunder that a privateer has been fitted out in our country in violation of its laws, the courts will not violate the obligation of neutrality by seizing and restoring prizes made by such privateer. *The Maria Josepha* (C. C. 1819), Fed. Cas. No. 9,078.

If the owner of a vessel provides and furnishes her, knowing that she is to be used for the transportation to a foreign country of an organized body of men, intending to act together in a concerted military way, and with arms, he is guilty of a violation of the statute. *U. S. v. O'Brien* (C. C. 1896), 75 Fed. 900.

What equipments in our ports amount to a breach of neutrality.—*Moodie v. The Betty Carthcart* (D. C. 1795), Fed. Cas. No. 9,742.

Where a privateer was illegally fitted out and commissioned in this country by the French minister, but was afterwards dismantled and her register canceled, then sold to a foreigner and fitted out and commissioned in a foreign port, held that her proceedings under the latter commission were not in violation of the neutrality laws. *Williamson v. The Betsy* (D. C. 1795), Fed. Cas. No. 17,750.

This section is designed to prevent hostile expeditions altogether by the seizure and forfeiture of the vessel engaged in them, and not to set a price by releasing the vessel on bond, upon the violation of international obligations; and no interpretation of the admiralty rules should be permitted which

would admit of that result. *The Mary N. Hogan* (D. C. 1883), 17 Fed. 813.

The offense under this section is confined to cases in which the vessel shall be fitted out with intent that she shall be employed to cruise or commit hostilities, and it does not forbid giving aid and comfort to either belligerent, and is not directed against commercial adventures or peaceable aid, however important, rendered by our citizens so long as such aid arises indirectly only through commercial dealings and in the ordinary channels of trade. *City of Mexico* (D. C. 1885), 24 Fed. 33, 36.

The terms "furnishing" and "fitting out" have no legal or technical meaning requiring a construction different from the ordinary acceptance in maritime and commercial parlance. *The City of Mexico* (D. C. 1886), 28 Fed. 148.

A vessel may at the same time transport a military enterprise and a cargo of arms and munitions of war, and while the transportation of the latter is lawful, that of the former is unlawful. *U. S. v. Murphy* (D. C. 1898), 84 Fed. 609.

Intent as element of offense.—It is not necessary that the intention should be carried into execution in order to constitute the offense. *U. S. v. Quincy* (1832), 6 Pet. 445, 463, 8 L. Ed. 458.

Defendant's intention is a question for the jury. *Id.*

It is necessary that the intention with respect to the employment of the vessel should be formed before she leaves the United States. *Id.*

To bring an American vessel within this section, it must be shown that the employment of the vessel in the prohibited service was pursuant to an intention formed within the limits of the United States; and the formation of such intention after she has left the jurisdiction of the United States, and while she is on the high seas, can not be construed, because of her nationality, to be within such limits. *U. S. v. The Laurada* (C. C. A. 1900), 98 Fed. 983.

To constitute an offense under this section, it is not necessary that the vessel should be armed or manned for the purpose of committing hostilities before she leaves the United States, if it is the intention that she be so fitted subsequently. *The City of Mexico* (D. C. 1886), 28 Fed. 148.

The crime necessary to be shown in order to secure a forfeiture of a vessel, under this section, consists of an act done within the limits of the United States, with the intent that the vessel in connection with which the act is done shall be employed in the service of some foreign prince or State, or colony, district, or people, as a cruiser or committer of hostilities against the sub-

jects, citizens, or property of some foreign prince or State, or colony, district, or people with whom the United States is at peace. The intent described in the statute is a necessary ingredient of the offense created by the statute, in the absence of which no crime is committed or forfeiture incurred. *The Conserva* (D. C. 1889), 38 Fed. 431.

It is necessary to a forfeiture that the intent that the vessel shall commit hostilities against the subjects or property of a friendly foreign power shall be formed within the limits of the United States and shall be of a fixed and unconditional nature. If the intent originates on the high seas after the vessel leaves our borders, no forfeiture accrues. *U. S. v. The Laurada* (D. C. 1898), 85 Fed. 760.

The act makes no difference between the degrees of intent with which a vessel shall be fitted out; any intent to commit hostilities against a nation with which the nation fitting her out is at war is within its prohibitions. (1849) 5 Op. Atty. Gen. 92.

Attempt defined.—See *U. S. v. Quincy* (1832), 6 Pet. 445, 463, 8 L. Ed. 458.

Independent States.—The parts of the island of St. Domingo respectively under the government of Petion and Christophe are not independent States, within the meaning of act of June 5, 1794, and therefore it is not illegal to fit out a vessel for the purpose of assisting the one against the other. *Hoyt v. Gelston* (N. Y. 1818), 13 Johns. 141.

New government.—The provisions of the statute do not apply to any new government unless it has been acknowledged by the United States or by the Government of the country to which such new State belonged. *Gelston v. Hoyt* (1818), 3 Wheat. 246, 323, 4 L. Ed. 381.

Recognition of belligerency.—This section, by forbidding the fitting out and arming of a vessel with intent that she shall be employed in the service of any foreign prince or State "or of any colony, district, or people," includes any insurgent or insurrectionary body of people acting together and conducting hostilities, though their belligerency has not been recognized. *U. S. v. The Three Friends* (1897), 17 Sup. Ct. 495, 497, 166 U. S. 1, 41 L. Ed. 897, reversing (D. C. 1897) 78 Fed. 175.

Under a libel seeking the forfeiture of a vessel under this section the vessel can not be condemned as piratical on the ground that she is in the employ of an insurgent party, which has not been recognized by our Government as having belligerent rights. *U. S. v. The Itata* (1893), 56 Fed. 505, 5 C. C. A. 608, following *U. S. v. Weed* (1866), 72 U. S. 62, 18 L. Ed. 531, and *The Watchful* (1867), 73 U. S. 91, 18 L. Ed. 763, and

affirming judgment (D. C. 1892) 49 Fed. 646.

Vessels belonging to citizens sailing out of our ports.—The law does not prohibit vessels belonging to citizens of the United States from sailing out of our ports. *U. S. v. Quincy* (1832), 6 Pet. 445, 463; 8 L. Ed. 458.

Equipment of vessels in neutral port.—Equipment for war in a neutral port does not take place merely by alteration of two ports in repairing the waist of a vessel previously armed. *Moodle v. The Brothers* (D. C. 1795), Fed. Cas. No. 9,743.

It is no breach of neutrality on the part of a belligerent to equip vessels of war in a neutral port, unless the act be interdicted. *Juando v. Taylor* (D. C. 1818), Fed. Cas. No. 7,558.

Building war vessels.—A vessel built and partly equipped in New York for warlike purposes was sold to a foreigner who carried her to a foreign port, where she was completely equipped and commissioned, and on a subsequent cruise a prize was taken. Held, that there was no violation of our neutrality. *Moodle v. The Alfred* (1796), 3 U. S. (3 Dall.) 307, 1 L. Ed. 614.

The building of two schooners of war in New York for the Mexican Government, and being about to be furnished with guns and the usual military equipments, is clearly within this section. (1818) 3 Op. Atty. Gen. 739.

These vessels having been built expressly for the service of Mexico, which is waging war against Texas, the persons are liable to the penalties of the act and the vessels to forfeiture. *Id.*

If such vessels, however, were not delivered, nor the property changed, within our jurisdiction, but were sent out of the port under control of our own citizens unarmed, and every possible precaution was taken to insure pacific conduct on the high seas, the doctrine above laid down, though reaffirmed, does not as fully apply to the case now presented as was supposed from the first statement of the case. (1842) 3 Op. Atty. Gen. 741.

Judicial proceedings should not be instituted by the United States, under this section, against certain gunboats building in New York for the Spanish Government, and which, there is reason to believe, are to be employed by that Government against Cuba. The provisions of this section examined and shown to be inapplicable, in view of all the circumstances, to the case considered. (1869) 13 Op. Atty. Gen. 177.

Sale of vessels to belligerents.—The sale of a vessel, fitted for a privateer, to the subject of a belligerent, which the purchaser subsequently equipped in a port of his own

country, is not a breach of our neutrality act. *The Alfred* (1796), 3 Dall. 307, 1 L. Ed. 614.

Mere carrying on of negotiations by the owners of a ship in this country with foreign agents, with knowledge that, if a sale were effected, the vessel would be employed against a nation with whom the United States is at peace, held not a breach of the law, the negotiations having failed. *U. S. v. The Meteor* (C. C. 1868), Fed. Cas. No. 15,760.

The purchase and fitting out a war steamer by the German Government in the port of New York whilst a state of war exists between that Government and Denmark, and which is adapted for cruising and committing hostilities against the property or subjects of the latter, is contrary to the provisions of this section. (1849) 5 Op. Atty. Gen. 92.

Necessity of fitting out and arming in United States.—Actual fitting out and arming in the United States is not necessary to subject to forfeiture a vessel in part prepared for hostilities therein. *The Meteor* (D. C. 1866), Fed. Cas. No. 9,498.

It is not necessary to a forfeiture of a vessel under this section that the furnishing, fitting out, or arming of her for the prohibited purpose should be completed within the limits of the United States. It is sufficient that, by prearrangement within the limits of the United States, the vessel having been procured here, the furnishing, fitting out, or arming is to be effected or completed after she has gone beyond those limits. *U. S. v. The Laurada* (D. C. 1898), 85 Fed. 760.

Expedition in separate parts meeting on sea and proceeding to hostile acts.—An expedition organized and dispatched from our ports, in separate parts, to meet at a common rendezvous on the high seas, and thence proceed to acts of hostility against a friendly power, is within the prohibition of this section. *U. S. v. The Mary N. Hogan* (D. C. 1883), 18 Fed. 529.

Conversion of merchant ship into war vessel.—The conversion of a merchant ship into a vessel of war to commit hostilities against a friendly nation is an original fitting out of a vessel with such intent, within the meaning of the statute. *U. S. v. Guinet* (C. C. 1795), Fed. Cas. No. 15,270, 2 Dall. 321, 328, 1 L. Ed. 398.

Vessels receiving and carrying arms and munitions.—This section does not cover the case of a vessel which receives arms and munitions of war in this country with intent to carry them to a party of insurgents in a foreign country, but not with intent that they shall constitute any part of the fittings or furnishings of the vessel herself. *U. S. v.*

The *Itata* (1893), 56 Fed. 505, 5 C. C. A. 608, affirming (D. C. 1892) 49 Fed. 646.

Transportation of arms and munitions to other vessels.—Under this section no forfeiture can be claimed of a vessel which is only employed to transport arms and munitions of war to a vessel fitting out to pursue the forbidden warlike enterprises. *U. S. v. The Robert and Minnie* (D. C. 1891), 47 Fed. 84.

Landing contraband cargo at point not blockaded.—The landing of a cargo contraband of war on the shore of the country of one belligerent at a point not blockaded, is not an act of hostility against the other belligerent. *The Florida* (D. C. 1871), Fed. Cas. No. 4,887.

Captures made by vessels violating law.—A vessel armed and fitted out in violation of the statutes of neutrality of the United States may not justify a capture. *The Santa Maria* (1822), 7 Wheat. 490, 494, 5 L. Ed. 505.

Captures made by a vessel in violation of the laws of the United States for the preservation of neutrality will be restored when brought within the territory of the United States. *The Monte Allegre* (1822), 7 Wheat. 520, 522, 5 L. Ed. 513.

Prosecutions and forfeiture proceedings under statute.—A libel of forfeiture against a vessel for violating the neutrality laws charged, in one article, that she was "heavily laden with supplies, rifles, cartridges, * * * and other munitions of war, including one large 12-pound Hotchkiss gun." In the following article it was charged that the vessel was "fitted out and armed by being heavily laden with supplies, rifles, cartridges," etc., "with intent," etc. Held that, while this libel was lacking in legal precision, yet, taken as a whole, it was sufficient as against objections first urged on appeal. *U. S. v. The Three Friends* (1898), 85 Fed. 424, 29 C. C. A. 244.

Proceedings for the enforcement of the neutrality laws are necessarily under control of the United States, and a proceeding against a vessel, seized on complaint of an informer for violation of this section, can not be continued, if the United States disavows and declines to ratify the seizure. *Olivier v. Hyland* (1911), 186 Fed. 843, 108 C. C. A. 576.

A vessel alleged to have been fitted out and armed in violation of the neutrality laws will be condemned, where the Govern-

ment's evidence raises a well-grounded suspicion, which claimants fail to explain. *The Meteor* (D. C. 1866), Fed. Cas. No. 9,498.

Evidence held sufficient to show that the firearms and ammunition shipped on a vessel were subject to forfeiture under this section. *U. S. v. Two Hundred and Fourteen Boxes of Arms, Ammunition, and Munitions of War* (D. C. 1884), 20 Fed. 50, 51, 52.

The evidence showed that a vessel was fitted out for the purpose of proceeding from New York to Samana, in a condition incapable of being used to commit hostilities against anyone, to be there delivered to the Government of the Dominican Republic. Held that, for the use to which she might thereafter be put by the Government of the Dominican Republic, that Government was responsible, and not the United States, and that a well-founded suspicion that the Government of the Dominican Republic would use the vessel to violate its neutral obligations was not sufficient to justify a finding in this case that the fitting out done in New York was done with the intent to use her to commit hostilities, which, under the statute, is the gist of the offense. *The Conserva* (D. C. 1889), 38 Fed. 431.

A consul of a foreign Government, who is the only representative present of his Government, has the right to intervene, and claim a vessel belonging to such Government, against which a libel has been filed to secure her forfeiture. *Id.*

A proceeding under this section is a simple suit in admiralty, where the decree will be simply that the libel be dismissed or the vessel condemned; and no decree of restitution is necessary. *Id.*

Informers.—In a proceeding to enforce the forfeiture of a vessel for violation of the neutrality laws, the fact that, after a decree of forfeiture, the case was allowed to remain open for further hearing on the question of who were entitled to a moiety of the proceeds as informers, and that only one person filed a petition making a claim, does not deprive others appearing on the original evidence to be entitled to share as informers. *The City of Mexico* (D. C. 1887), 32 Fed. 105.

An "informer" is one who gives information leading directly to seizure and condemnation regardless of the questions of evidence furnished or interest taken in the prosecution. *Id.*

2918. Fitting out armed vessels during a war in which the United States is neutral.—During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or con-

tract, written or oral, that such vessel shall be delivered to a belligerent nation, or to an agent, officer, or citizen of such nation, or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States. *Sec. 3, title V, act of June 15, 1917 (40 Stat. 222).*

2919. Augmenting the force of an armed vessel of a foreign government.—Whoever, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be fined not more than one thousand dollars and imprisoned not more than one year. *Sec. 12, Criminal Code, act of March 4, 1909 (35 Stat. 1090).*

Notes of Decisions.

See, also, notes under 2921, post.

Augmenting force in general.—The substitution of new for old gun carriages is not such an illegal augmentation of the forces of a foreign vessel as will forfeit her right to a prize subsequently captured from a belligerent power at peace with the United States. *Geyer v. Michel (1796), 3 U. S. (3 Dall.) 285, 1 L. Ed. 605.*

In case of an illegal augmentation of the force of a belligerent cruiser in our ports by enlisting men, it is incumbent on a claimant to show that the persons enlisted were subjects of the belligerent state or belonging to its service, and then transiently within the United States. *The Santissima Trinidad (1822), 20 U. S. (7 Wheat.) 283, 5 L. Ed. 454.*

Raising or lowering gun carriages on a vessel of war, or replacing rotten with sound timbers, is an offense, within sec. 4, act of June 5, 1794. *U. S. v. Grassin (C. C. 1811), Fed. Cas. No. 15,248.*

The repair of Mexican war steamers in the port of New York, together with the augmenting of their force by adding to the number of their guns, or by changing those originally on board for those of larger caliber, or by the addition of any equipment solely applicable to war, is a violation of the statute. (1844) 4 Op. Atty. Gen. 336.

But the repair of their bottoms, copper, etc., does not constitute any increase or augmentation of force within the meaning of the act, and the steamers themselves are not subject to seizure by any judicial process under it. *Id.*

Liability of officers of vessels of other nations.—Commanders and officers of vessels of other nations found to have violated the statute in question are amenable to the criminal jurisdiction of our courts, and may be prosecuted. (1844) 4 Op. Atty. Gen. 336.

Restitution of prize because of augmenting force.—Under act of June, 1794, relating to the enlistment within the territory of the United States of persons to serve as soldiers and marines on board vessels of war, the district courts of the United States have jurisdiction to restore to the original Spanish owner (in amity with the United States) his property captured by a French vessel, whose force has been increased in the United States if the prize be brought intra præsidia. *The Alerta v. Moran (1815), 9 Cranch, 359, 365, 3 L. Ed. 758.*

Where restitution of captured property is claimed on the ground that the force of the cruiser making the capture was augmented within the United States by enlisting men, the burden of proving such enlistment is on the claimant, and, that fact being proved, it is incumbent on the captors to show by proof that the persons so enlisting were subjects or citizens of the prince or state under whose flag the cruiser sailed, transiently within the United States, in order to bring the case within the provision of sec. 2 of act of June 5, 1794, and of act of Apr. 20, 1818. *The Estrella (1819), 4 Wheat. 298, 305, 4 L. Ed. 574.*

An augmentation of force in our ports is a breach of neutrality, and of the law of nations, and of the United States; and will occasion a restitution of the prize if brought within our jurisdiction. *British Consul v. The Nancy* (D. C. 1799), Fed. Cas. No. 1898.

Prizes made by armed vessels, either equipped originally, or whose force has been augmented, in the United States, will be restored if brought within their jurisdiction. *Juando v. Taylor* (D. C. 1818), Fed. Cas. No. 7,558.

2920. Detention of armed vessels.—During a war in which the United States is a neutral nation, the President, or any person thereunto authorized by him, may detain any armed vessel owned wholly or in part by American citizens, or any vessel, domestic or foreign (other than one which has entered the ports of the United States as a public vessel), which is manifestly built for warlike purposes or has been converted or adapted from a private vessel to one suitable for warlike use, until the owner or master, or person having charge of such vessel, shall furnish proof satisfactory to the President, or to the person duly authorized by him, that the vessel will not be employed by the said owners, or master, or person having charge thereof, to cruise against or commit or attempt to commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with which the United States is at peace, and that the said vessel will not be sold or delivered to any belligerent nation, or to an agent, officer, or citizen of such nation, by them or any of them, within the jurisdiction of the United States, or, having left that jurisdiction, upon the high seas. *Sec. 2, title V, act of June 15, 1917 (40 Stat. 221).*

2921. Enterprises against foreign states to be prevented by armed forces.—The district courts shall take cognizance of all complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof. In every case in which a vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel is increased or augmented, or in which any military expedition or enterprise is begun or set on foot, contrary to the provisions and prohibitions of this chapter; and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any court of the United States is disobeyed or resisted by any person having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, it shall be lawful for the President, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such vessel, with her prizes, if any, in order to enforce the execution of the prohibitions and penalties of this chapter, and the restoring of such prizes in the cases in which restoration shall be adjudged; and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territory or jurisdiction of the United States against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace. *Sec. 14, Criminal Code, act of March 4, 1909 (35 Stat. 1090).*

That the President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purposes of this title. *Sec. 2, title V, act of June 15, 1917 (40 Stat. 223).*

Notes of Decisions.

Arrest and incarceration of Mexican by military authorities.—An order directing the arrest of a Mexican alien by the military authorities in the United States and his incarceration without trial, while an attempt was being made to secure evidence that he was endeavoring to violate the neutrality laws, held void, and that he was entitled to his discharge on habeas corpus. *Ex parte Orozco* (D. C. 1912), 201 Fed. 106.

Seizure of vessel or property by military officers.—Property may be seized by the commanding officer of a military force ordered out to prevent the violation of the neutrality act of 1838, with a view to detaining the same until it should be proceeded against in the manner directed by law. *Stoughton v. Dimick* (C. C. 1855), Fed. Cas. No. 13,500.

An officer in the Army, with orders to execute the neutrality act of Mar. 10, 1838, has authority to arrest a vessel containing arms and munitions of war intended to be carried to insurgent subjects of Great Britain, although the vessel itself is not about to pass the frontier. *Stoughton v. Dimick* (1855), 20 Vt. (3 Williams) 535.

Plea justifying seizure.—A plea justifying a seizure under the President's instructions must aver that the naval or military force was employed for that purpose, and that the seizure belonged to the force. *Gelston v. Hoyt* (1818), 3 Wheat. 246, 330, 4 L. Ed. 381.

Interference with judiciary in proceedings under statute.—The executive has no right to interfere with the judiciary in proceedings against persons charged with being concerned in hostile expeditions against friendly nations. (1895) 21 Op. Atty. Gen. 267.

Determination on preliminary examination of question as to military expedition.—The question whether a military expedition against a nation with which the United States was at peace was really to depend upon war being declared will not be determined upon a preliminary examination. *U. S. v. Burr* (C. C. 1807), Fed. Cas. No. 14,694a.

Affidavit as justifying commitment for setting expedition on foot.—Sufficiency of affidavit giving translation of letter and cipher, taken in connection with declarations of accused to justify commitment for setting on foot a military expedition against a nation with which the United States was at peace. *U. S. v. Burr* (C. C. 1807), Fed. Cas. No. 14,692a.

Evidence of breach of neutrality by arrested vessel.—Evidence to acquit or con-

demn, in the case of a vessel arrested for breach of the neutrality laws, must, in the first instance, come from the vessel taken, the persons on board, and the examination on oath of the officers. *Moodle v. The Betty Carthart* (D. C. 1795), Fed. Cas. No. 9,742.

Restoration of captured property.—The district courts of the United States have jurisdiction to restore to the original Spanish owners, in amity with the United States, property captured by a French vessel whose force was increased in the United States in violation of the neutrality of the United States, if the prize be brought *infra præsidia*; it being the duty of the neutral nation in such case to restore the property to its owner. *The Alerta v. Blas Moran* (1815), 13 U. S. (9 Cranch) 359, 3 L. Ed. 758.

In absence of an act of Congress on the subject, the Federal courts would have authority under the general law of nations to decree restitution of property captured in violation of their neutrality, under a commission issued within the United States or under an armament or augmentation of the armament or crew of the captured vessel within the same. *The Estrella* (1819), 17 U. S. 298, 311, 4 L. Ed. 574.

Where restitution of captured property is claimed upon the ground that the force of the cruiser making the capture has been augmented within the United States, by enlisting men, the burden of proving such enlistment is thrown upon the claimant; and, that fact being proved, it is incumbent on the captors to show by proof that the persons so enlisted were subjects or citizens of the prince or state under whose flag the cruiser sails, transiently within the United States, in order to bring the case within the proviso of section 2, act of June 5, 1794, and of act of Apr. 20, 1818. *Id.*

Whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners, but jurisdiction in cases of violation of neutrality is not carried beyond authority to decree restoration of the specific property, with costs and expenses, during the pendency of the judicial proceedings. *La Amistad de Rues* (1820), 18 U. S. (5 Wheat.) 385, 389, 5 L. Ed. 115.

A vessel captured by an armed vessel fitted out in a port of the United States, in violation of our neutrality, will be restored to the original owners, and the claim of an alleged bona fide purchaser in a foreign port rejected. *The La Concepcion* (1821), 19

U. S. (6 Wheat.) 235, 5 L. Ed. 249; *The Fanny* (1824), 22 U. S. (9 Wheat.) 658, 6 L. Ed. 184.

Prizes made by armed vessels, which have violated the statutes for preserving the neutrality of the United States, will be restored if brought into our ports. *The Santissima Trinidad* (1822), 20 U. S. (7 Wheat.) 233, 5 L. Ed. 454; *The Gran Para* (1822), 20 U. S. (7 Wheat.) 471, 5 L. Ed. 501.

The United States, having captured a vessel for alleged violation of neutrality laws, delayed bringing her in for condemnation for 175 days, and continued to use her in military and naval service under a charter party which stipulated that it should be void if the vessel was confiscated, and by which the United States agreed to pay \$200 a day for the use of her. Held, upon a decree of restitution, that, the United States having submitted to the jurisdiction, a judgment for damages for demurrage could properly be rendered against it, and that claimant was fairly entitled to \$200 per diem from the

seizure until the vessel was actually surrendered for adjudication, and also to her value in money, with interest to the decree of restitution. *U. S. v. The Nuestra Senora De Regla* (1883), 108 U. S. 92, 2 Sup. Ct. 287, 27 L. Ed. 662.

Though the question of prize or no prize belongs exclusively to the courts of the captor, a neutral will restore a prize wrongfully taken by one of the belligerents in violation of the rights of the neutral. *Chacon v. Eighty-Nine Bales of Cochineal* (C. C. 1821), Fed. Cas. No. 2,568.

Authority to arrest and detain suspected person.—This section held not to authorize the President to use the military power in time of peace to arrest without a warrant and imprison without the benefit of a trial a person within the United States merely suspected of intention to organize an expedition in aid of a revolution in his own country with which the United States is at peace. *Ex parte Orozco* (D. C. 1912), 201 Fed. 108.

2922. Enterprises against a foreign nation furthered by aliens.—The provisions of this chapter shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people who is transiently within the United States and enlists or enters himself on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, or hires or retains another subject or citizen of the same foreign prince, state, colony, district, or people who is transiently within the United States to enlist or enter himself to serve such foreign prince, state, colony, district, or people on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people. Nor shall they be construed to prevent the prosecution or punishment of treason, or of any piracy defined by the laws of the United States. *Sec. 18, Criminal Code, act of March 4, 1909 (35 Stat. 1091).*

2923. Departure and detention of foreign vessels.—It shall be lawful for the President to employ such part of the land or naval forces of the United States, or of the militia thereof, as he may deem necessary to compel any foreign vessel to depart from the United States or any of its possessions in all cases in which, by the law of nations or the treaties of the United States, it ought not to remain, and to detain or prevent any foreign vessel from so departing in all cases in which, by the law of nations or the treaties of the United States, it is not entitled to depart. *Sec. 15, Criminal Code, act of March 4, 1909 (35 Stat. 1091), as amended by sec. 10, title V, act of June 15, 1917 (40 Stat. 223).*

2924. Export of arms or munitions of war.—That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress. *Sec. 1, Joint*

Res. 25, April 22, 1898 (30 Stat. 739), as amended by Joint Res. 10, March 14, 1912 (37 Stat. 630).

That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both. *Sec. 2, Joint Res. 25, April 22, 1898 (30 Stat. 739), as amended by Joint Res. 10, March 14, 1912 (37 Stat. 630).*

Notes of Decisions.

Validity.—Joint Resolution No. 10, Mar. 14, 1912 (37 Stat. 630), prohibiting the exportation of arms or munitions of war to an American country in which the President has proclaimed the existence of domestic violence promoted by the use of arms or munitions of war imported from the United States held valid. *Talbott v. U. S.* (1913), 208 Fed. 144, 125 C. C. A. 360.

Exportation.—The act of sending from the United States to a foreign and prohibited country, without reference to the completion of such act by the landing or delivery of the merchandise at its destination, is condemned by this section and the section following. *U. S. v. Chavez* (1913), 33 Sup. Ct. 505, 228 U. S. 525, 57 L. Ed. 950, reversing judgment (D. C. 1912), 196 Fed. 518.

Resort to personal carriage to move prohibited articles from the United States to a foreign and prohibited country will not render inapplicable the prohibitions of this section and the section following. *Id.*

Articles prohibited.—The words "arms or munitions of war," within the meaning of this section, embrace weapons used for the destruction of life, together with ammunition and equipment useful in connection with them, and explosives and other equipment of a military character, or articles used for the construction of such equipment. (1912) 29 Op. Atty. Gen. 375.

Foodstuffs, ordinary clothing, and ordinary articles of peaceful commerce are not included in the prohibition. *Id.*

The exportation of saddles, bridles, canteens, and carbine scabbards by merchants in the United States to other merchants in Mexico falls within the purview of the President's proclamation of Mar. 14, 1912, prohibiting the export of arms or munitions of war to that country. (1912) 29 Op. Atty. Gen. 394.

Gun grease is within the prohibition of the President's proclamation of Mar. 14, 1912, issued pursuant to the joint resolu-

tion of the same date, forbidding the exportation of arms or munitions of war to Mexico. (1912) 29 Op. Atty. Gen. 414.

Paper caps for toy cap pistols could hardly be considered within the prohibition of the President's proclamation of Mar. 14, 1912, issued pursuant to the joint resolution of the same date, forbidding the exportation of arms and munitions of war to Mexico, whereas air rifles might well be regarded within the prohibition. The question, however, is one of fact, dependent upon the character of the articles sought to be imported. (1912) 29 Op. Atty. Gen. 570.

Clothes and provisions are not munitions of war within the meaning of the amended joint resolution of Mar. 14, 1912 (37 Stat. 630), prohibiting the export of arms or munitions of war to any American country in which, according to the President's proclamation, conditions of domestic violence exist which are promoted by the use of such materials. (1913) 30 Op. Atty. Gen. 213.

Ordinary empty cars belonging to Mexican railways are not "munitions of war" within the meaning of the President's proclamation of Oct. 19, 1915, prohibiting the exportation of such munitions into Mexico.

Coal and coke are not included in the term "munitions of war" as used in the President's proclamation of Oct. 19, 1915.

There is no authority of law (other than the quarantine act) forbidding the importation of cattle and other live stock from Mexican territory occupied by the revolutionists, the proceeds of which would be used to continue revolutionary activities. (1915) 30 Op. Atty. Gen. 467.

Proclamation.—The President's proclamation of Oct. 14, 1905, (34 Stat. 3183), prohibiting the export of arms, ammunition, and munitions of war to the Dominican Republic, pursuant to a joint resolution of Apr. 22, 1898 (30 Stat. 739), is still operative under this section. (1912) 29 Op. Atty. Gen. 387.

2925. Seizure by the United States of arms and other unlawful exports.—Whenever an attempt is made to export or ship from or take out of the United States, any arms or munitions of war, or other articles, in violation of law, or whenever there shall be known or probable cause to believe that any such

arms or munitions of war, or other articles, are being or are intended to be exported, or shipped from, or taken out of the United States, in violation of law, the several collectors, naval officers, surveyors, inspectors of customs, and marshals, and deputy marshals of the United States, and every other person duly authorized for the purpose by the President, may seize and detain any articles or munitions of war about to be exported or shipped from, or taken out of the United States, in violation of law, and the vessels or vehicles containing the same, and retain possession thereof until released or disposed of as hereinafter directed. If upon due inquiry as hereinafter provided, the property seized shall appear to have been about to be so unlawfully exported, shipped from, or taken out of the United States, the same shall be forfeited to the United States. *Sec. 1, title VI, act of June 15, 1917 (40 Stat. 223).*

Except in those cases in which the exportation of arms and munitions of war or other articles is forbidden by proclamation or otherwise by the President, as provided in section one of this title, nothing herein contained shall be construed to extend to, or interfere with any trade in such commodities, conducted with any foreign port or place wheresoever, or with any other trade which might have been lawfully carried on before the passage of this title, under the law of nations, or under the treaties or conventions entered into by the United States, or under the laws thereof. *Sec. 6, title VI, act of June 15, 1917 (40 Stat. 225).*

Secs. 2 to 7, inclusive, of this title, relate to the legal procedure for the disposition of such property.

2926. Arms and unlawful exports seized by armed force.—The President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purposes of this title. *Sec. 8, title VI, act of June 15, 1917 (40 Stat. 225).*

2927. Clearance refused to vessels carrying munitions of war.—During a war in which the United States is a neutral nation, the President, or any person thereunto authorized by him, may withhold clearance from or to any vessel, domestic or foreign, which is required by law to secure clearance before departing from port or from the jurisdiction of the United States, or, by service of formal notice upon the owner, master, or person in command or having charge of any domestic vessel not required by law to secure clearances before so departing, to forbid its departure from port or from the jurisdiction of the United States, whenever there is reasonable cause to believe that any such vessel, domestic or foreign, whether requiring clearance or not, is about to carry fuel, arms, ammunition, men, supplies, dispatches, or information to any warship, tender, or supply ship of a foreign belligerent nation in violation of the laws, treaties, or obligations of the United States under the law of nations; and it shall thereupon be unlawful for such vessel to depart. *Sec. 1, title V, act of June 15, 1917 (40 Stat. 221).*

2928. Imports restricted in retaliation for discrimination against products of the United States.—That whenever, during the existence of a war in which the United States is not engaged, the President shall be satisfied that there is reasonable ground to believe that under the laws, regulations, or practices of any country, colony, or dependency contrary to the law and practice of nations, the importation into their own or any other country, dependency, or colony of any article the product of the soil or industry of the United States and not injurious to health or morals is prevented or restricted the President is authorized and empowered to prohibit or restrict during the period such prohibi-

tion or restriction is in force, the importation into the United States of similar or other articles, products of such country, dependency, or colony as in his opinion the public interest may require; and in such case he shall make proclamation stating the article or articles which are prohibited from importation into the United States; and any person or persons who shall import, or attempt or conspire to import, or be concerned in importing, such article or articles, into the United States contrary to the prohibition in such proclamation, shall be liable to a fine of not less than \$2,000 nor more than \$50,000, or to imprisonment not to exceed two years, or both, in the discretion of the court. The President may change, modify, revoke, or renew such proclamation in his discretion. *Sec. 805, title VIII, act of Sept. 8, 1916 (39 Stat. 799).*

2929. Detention of foreign vessels for giving undue commercial advantage to some individual.—That whenever, during the existence of a war in which the United States is not engaged, the President shall be satisfied that there is reasonable ground to believe that any vessel, American or foreign, is, on account of the laws, regulations, or practices of a belligerent Government, making or giving any undue or unreasonable preference or advantage in any respect whatsoever to any particular person, company, firm, or corporation, or any particular description of traffic in the United States or its possessions or to any citizens of the United States residing in neutral countries abroad, or is subjecting any particular person, company, firm, or corporation or any particular description of traffic in the United States or its possessions, or any citizens of the United States residing in neutral countries abroad to any undue or unreasonable prejudice, disadvantage, injury, or discrimination in regard to accepting, receiving, transporting, or delivering, or refusing to accept, receive, transfer, or deliver any cargo, freight or passengers, or in any other respect whatsoever, he is hereby authorized and empowered to direct the detention of such vessels by withholding clearance or by formal notice forbidding departure, and to revoke, modify, or renew any such direction. * * * *Sec. 806, title VIII, act of Sept. 8, 1916 (39 Stat. 799-800).*

2930. Detention of vessels of a country where commercial facilities are denied to Americans.— * * * That whenever, during the existence of a war in which the United States is not engaged, the President shall be satisfied that there is reasonable ground to believe that under the laws, regulations, or practices of any belligerent country or Government, American ships or American citizens are not accorded any of the facilities of commerce which the vessels or citizens of that belligerent country enjoy in the United States or its possessions, or are not accorded by such belligerent equal privileges or facilities of trade with vessels or citizens of any nationality other than that of such belligerent, the President is hereby authorized and empowered to withhold clearance from one or more vessels of such belligerent country until such belligerent shall restore to such American vessels and American citizens reciprocal liberty of commerce and equal facilities of trade; or the President may direct that similar privileges and facilities, if any, enjoyed by vessels or citizens of such belligerent in the United States or its possessions be refused to vessels or citizens of such belligerent; and in such case he shall make proclamation of his direction, stating the facilities and privileges which shall be refused, and the belligerent to whose vessels or citizens they are to be refused, and thereafter the furnishing of such prohibited privileges and facilities to any vessel or citizen of the belligerent named in such proclamation shall be unlawful; and he may change, modify, revoke, or renew such proclamation; and any person or persons who shall

furnish or attempt or conspire to furnish or be concerned in furnishing or in the concealment of furnishing facilities or privileges to ships or persons contrary to the prohibition in such proclamation shall be liable to a fine of not less than \$2,000 nor more than \$50,000 or to imprisonment not to exceed two years, or both, in the discretion of the court. * * * *Sec. 806, title VIII, act of Sept. 8, 1916 (39 Stat. 800).*

2931. Vessels departing without clearance.— * * * In case any vessel which is detained by virtue of this Act shall depart or attempt to depart from the jurisdiction of the United States without clearance or other lawful authority, the owner or master or person or persons having charge or command of such vessel shall be severally liable to a fine of not less than \$2,000 nor more than \$10,000, or to imprisonment not to exceed two years, or both, and in addition, such vessel shall be forfeited to the United States. * * * *Sec. 806, title VIII, act of Sept. 8, 1916 (39 Stat. 800).*

2932. Armed forces employed to enforce neutrality in commerce.— * * * That the President of the United States is hereby authorized and empowered to employ such part of the land or naval forces of the United States as shall be necessary to carry out the purposes of this Act. *Sec. 806, title VIII, act of Sept. 8, 1916 (39 Stat. 800).*

2933. Control of vessels in territorial waters of the United States in time of war.—Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

Within the territory and waters of the Canal Zone the Governor of the Panama Canal, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury. *Sec. 1, title II, act of June 15, 1917 (40 Stat. 220).*

2934. Seizure of vessels in time of war.—If any owner, agent, master, officer, or person in charge, or any member of the crew of any such vessel fails to comply with any regulation or rule issued or order given by the Secretary of the Treasury or the Governor of the Panama Canal under the provisions of this title, or obstructs or interferes with the exercise of any power conferred by this title, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and the person guilty of such failure, obstruction, or interference shall be fined not more than \$10,000, or imprisoned not more than two years, or both. *Sec. 2, title II, act of June 15, 1917 (40 Stat. 220).*

2935. Willful injury of vessels, conspiracy aboard, etc.—It shall be unlawful for the owner or master or any other person in charge or command of any private vessel, foreign or domestic, or for any member of the crew or other person, within the territorial waters of the United States, willfully to cause or permit the destruction or injury of such vessel or knowingly to permit said vessel to be used as a place of resort for any person conspiring with another or preparing to commit any offense against the United States, or in violation of the treaties of the United States or of the obligations of the United States under the law of nations, or to defraud the United States, or knowingly to permit such vessels to be used in violation of the rights and obligations of the United States under the law of nations; and in case such vessel shall be so used, with the knowledge of the owner or master or other person in charge or command thereof, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandlse is forfeited for violation of the customs revenue laws; and whoever violates this section shall be fined not more than \$10,000 or imprisoned not more than two years, or both. *Sec. 3, title II, act of June 15, 1917 (40 Stat. 220).*

2936. Control of vessels in territorial waters by armed force.—The President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purpose of this title. *Sec. 4, title II, act of June 15, 1917 (40 Stat. 220).*

CHAPTER 48.

ALIENS.

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2937. Readmission to the United States of veterans of the World War.—That, notwithstanding the provisions of section three of the immigration Act of February fifth, nineteen hundred and seventeen, excluding from the United States aliens who are likely to become a public charge, or who are physically defective, or who are contract laborers, or who have come in consequence of advertisements for labor printed, published, or distributed in a foreign country, or who are assisted by others to come, or whose ticket or passage is paid for with the money of another or by any corporation, association, society, municipality, or foreign government, or who are stowaways, or who are illiterate, aliens lawfully resident in the United States when heretofore or hereafter enlisted or conscripted for the military or naval service of the United States, or of any one of the nations cobelligerent of the United States in the present war; and aliens lawfully resident in the United States who have enlisted for service with Czecho-Slovak, Polish, or other independent forces attached to the United States Army or to the army or navy of any one of the cobelligerents of the United States in the present war, who may during or within one year after the termination of the war apply for readmission to this country, after being honorably discharged or granted furlough abroad by the proper military or naval authorities, or after being rejected on final examination in connection with their enlistment or conscription shall, within two years after the termination of the war, be readmitted; and that any alien of either of the foregoing descriptions who would otherwise be excluded under said section of the immigration Act on the ground that he is idiotic, imbecile, feeble-minded, epileptic, insane, or has had one or more attacks of insanity, or on the ground that he is afflicted with constitutional psychopathic inferiority, tuberculosis, a loathsome or dangerous contagious disease, or mental defect, shall be readmitted if it is proved that the disability was acquired while the alien was serving in the military or naval forces of the United States or of any one of the nations cobelligerent of the United States in the present war or in an inde-

pendent force of the kind hereinbefore described, if such alien returns to a port of the United States within two years after the termination of the war; and that the head tax provided in the Immigration Act of February fifth, nineteen hundred and seventeen, shall not be collected from aliens readmitted into the United States under the provisions of this resolution. *Joint Res. 44, Oct. 19, 1918 (40 Stat. 1014).*

2938. Naturalization of aliens honorably discharged from the Army.—Any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the regular or volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States. *R. S. 2166.*

That the following provisions of law be, and they are hereby, repealed: Section twenty-one hundred and sixty-six * * * of the Revised Statutes * * * *Provided further*, That as to all aliens who, prior to January first, nineteen hundred, served in the Armies of the United States and were honorably discharged therefrom, section twenty-one hundred and sixty-six of the Revised Statutes of the United States shall be and remain in full force and effect, anything in this Act to the contrary notwithstanding. *Sec. 2, act of May 9, 1918 (40 Stat. 547).*

Notes of Decisions.

Repeal.—*R. S. 2166* was not repealed by naturalization act of June 29, 1906 (34 Stat. 506). *Bessho v. U. S.* (1910), 178 Fed. 245, 247, 101 C. C. A. 605; *U. S. v. Meyer* (D. C. 1909), 170 Fed. 983, 984; *In re Leichtag* (D. C. 1914), 211 Fed. 681.

Naval or marine service.—The word "armies" does not include "marines." *In re Bailey* (D. C. 1872), Fed. Cas. No. 728. Nor persons who have served in the Navy. *In re Chamayas* (Super. Buff. 1892), 21 N. Y. Supp. 104, following *In re Bailey* (D. C. 1872), Fed. Cas. No. 728, and disapproving *In re Stewart* (1868), 30 N. Y. Super Ct. (7 Rob.) 635.

Race.—The right of naturalization is not extended by this section to a person of the Mongolian race, either Chinese or Japanese. *In re Buntaro Kumagai* (D. C. 1908), 163 Fed. 922, 924; *In re Knight* (D. C. 1909), 171 Fed. 299. Nor to a person one-fourth white and three-fourths brown or Malay. *In re Alverto* (D. C. 1912), 198 Fed. 688.

Expatriation.—Act of Mar. 2, 1907 (34 Stat. 1228), providing that naturalization of a citizen by any foreign State or residence of a naturalized citizen in a foreign State shall constitute expatriation, held

to apply only to citizens, and that an honorably discharged soldier of the United States was not barred of his right to become a citizen, as provided by this section, by returning to Switzerland and holding an elective office there while an alien. *In re Wildberger* (D. C. 1914), 214 Fed. 508.

Proof of residence and moral character.—The phrase "as now provided by law" was not affected by naturalization act of June 29, 1906, requiring two witnesses to residence and good character, and proof to the satisfaction of the court is sufficient. *In re Loftus* (C. C. 1908), 165 Fed. 1002, 1003; *In re McNabb* (D. C. 1909), 175 Fed. 511.

Proof of residence may be made by depositions. *In re McNabb* (D. C. 1909), 175 Fed. 511.

An honorably discharged soldier need not have been a resident of the State for one year. *In re Leichtag* (D. C. 1914), 211 Fed. 681.

Furlough to reserve.—An alien who had served three years in the Army and was thereupon furloughed to the Reserve is not entitled to naturalization under *R. S. 2202*. *In re Markun* (D. C. 1916), 232 Fed. 2028.

2939. Naturalization of aliens after three years' military service.—Seventh. Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the Regular or the Volunteer Forces, or the National Army, the National Guard or Naval Militia of any State, Territory, or the District of Columbia, or the State militia in Federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of this subdivision it is shown that such residence can not be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; * * * *Par. 7, added to sec. 4, act of June 29, 1906, by sec. 1, act of May 9, 1918 (40 Stat. 542).*

2940. Naturalization of an alien a condition of enlistment in the Army.—Seventh. * * * any alien declarant who has served in the United States Army or Navy, or the Philippine Constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition, by two witnesses, citizens of the United States, and in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for purposes of naturalization; * * * *Par. 7, added to sec. 4, act of June 29, 1906, by sec. 1, act of May 9, 1918 (40 Stat. 542).*

2941. Naturalization of Indians.—That every American Indian who served in the Military or Naval Establishments of the United States during the war against the Imperial German Government, and who has received or who shall hereafter receive an honorable discharge, if not now a citizen and if he so desires, shall, on proof of such discharge and after proper identification before a court of competent jurisdiction, and without other examination except as prescribed by said court, be granted full citizenship with all the privileges pertaining thereto, without in any manner impairing or otherwise affecting the property rights, individual or tribal, of any such Indian or his interest in

tribal or other Indian property. *Act received by the President, Oct. 25, 1919, became law without approval (41 Stat. 350).*

2943. Affidavits of witnesses as to military service of an alien.—Seventh. * * * The time of military service may be established by the affidavits of at least two other citizens of the United States, which, together with the oath of allegiance, may be taken in accordance with the terms of section seventeen hundred and fifty of the Revised Statutes of the United States after notice from and under regulations of the Bureau of Naturalization. Such affidavits and oath of allegiance shall be admitted in evidence in any original or appellate naturalization proceeding without proof of the genuineness of the seal or signature or of the official character of the officer before whom the affidavits and oath of allegiance were taken, and shall be filed by the representative of the Government from the Bureau of Naturalization at the hearing as provided by section eleven of the Act of June twenty-ninth, nineteen hundred and six. Members of the Naturalization Bureau and Service may be designated by the Secretary of Labor to administer oaths relating to the administration of the naturalization law; and the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under section fifteen of the Act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, part one, page five hundred and ninety-six), may also be performed by the Commissioner or Deputy Commissioner of Naturalization: *Provided*, That it shall not be lawful to make a declaration of intention before the clerk of any court on election day or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court: * * * *Par. 7, added to sec. 4, act of June 29, 1906, by sec. 1, act of May 9, 1918 (40 Stat. 543).*

R. S. 1750 provides for administering or taking oaths, affirmations, affidavits, or depositions, and performing notarial acts by secretaries of legations and consular officers; the penalty for perjury in such cases; and the penalty for forging certificates of oath.

2943. Residence requirements for the naturalization of veterans of the World War.—Thirteenth. That any person who is serving in the military or naval forces of the United States at the termination of the existing war, and any person who before the termination of the existing war may have been honorably discharged from the military or naval services of the United States on account of disability incurred in line of duty, shall, if he applies to the proper court for admission as a citizen of the United States, be relieved from the necessity of proving that immediately preceding the date of his application he has resided continuously within the United States the time required by law of other aliens, or within the State, Territory, or the District of Columbia for the year immediately preceding the date of his petition for naturalization, but his petition for naturalization shall be supported by the affidavits of two credible witnesses, citizens of the United States, identifying the petitioner as the person named in the certificate of honorable discharge, which said certificate may be accepted as evidence of good moral character required by law, and he shall comply with the other requirements of the naturalization law. *Par. 13, added to sec. 4, act of June 29, 1906, by sec. 1, act of May 9, 1918 (40 Stat. 546).*

2944. Certificate of military service of an alien in lieu of proof of residence.—Seventh. * * * and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed prima

facile evidence to satisfy all of the requirements of residence within the United States and within the State, Territory, or the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States, identifying the applicant as the person named in the certificate or honorable discharge, and in these cases only where the alien is actually in the military or naval service of the United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed; * * * *Par. 7, added to sec. 4, act of June 29, 1906, by sec. 1, act of May 9, 1918 (40 Stat. 543).*

2945. Affidavits of witnesses as to residence of an alien.—Seventh. * * * The petition shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, and who shall prove in their affidavits the portion of the residence that they have personally known the applicant to have resided within the United States. * * * *Par. 7, added to sec. 4, act of June 29, 1906, by sec. 1, act of May 9, 1918 (40 Stat. 543).*

2946. Application for the naturalization of a soldier filed in the nearest court.—Seventh. * * * and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitation upon the jurisdiction of the courts specified in section three of the Act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the Government from the Bureau of Naturalization and made a part of the record at the original and any subsequent hearings; * * * *Par. 7, added to sec. 4, act of June 29, 1906, by sec. 1, act of May 9, 1918 (40 Stat. 543).*

2947. Petition for naturalization filed without appearance by a soldier.—Seventh. * * * Any alien, who, at the time of the passage of this Act, is in the military service of the United States, who may not be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court. * * * *Par. 7, added to sec. 4, act of June 29, 1906, by sec. 1, act of May 9, 1918 (40 Stat. 543).*

2948. Fees for naturalization of a soldier.—Seventh. * * * During the time when the United States is at war no clerk of a United States court shall charge or collect a naturalization fee from an alien in the military service of the United States for filing his petition or issuing the certificate of naturalization upon admission to citizenship, and no clerk of any State court shall charge or collect any fee for this service unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected. A full accounting for all of these transactions shall be made to the Bureau of Naturalization in the manner provided by section thirteen of the Act of June twenty-ninth, nineteen hundred and six. *Par. 7, added to sec. 4, act of June 29, 1906, by sec. 1, act of May 9, 1918 (40 Stat. 544).*

Sec. 13, act of June 29, 1906 (34 Stat. 600), was amended by sec. 1, act of June 25, 1910 (36 Stat. 829).

2949. Fees for naturalization of veterans of the World War.—Any person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section 4 of the Act of June 29, 1906, Thirty-fourth Statutes at Large, part 1, page 596, as amended, and shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all of the American troops are returned to the United States. *Act of July 19, 1919 (41 Stat. 222).*

2950. Petition for naturalization of a soldier to be heard immediately.—Seventh. * * * any petition for naturalization filed under the provisions of this subdivision may be heard immediately, notwithstanding the law prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court. * * * *Par. 7, added to sec. 4, act of June 29, 1906, by sec. 1, act of May 9, 1918 (40 Stat. 545).*

2951. Naturalization of a subject of an enemy country.—Eleventh. No alien who is a native, citizen, subject, or denizen of any country, State, or sovereignty with which the United States is at war shall be admitted to become a citizen of the United States unless he made his declaration of intention not less than two nor more than seven years prior to the existence of the state of war, or was at that time entitled to become a citizen of the United States, without making a declaration of intention, or unless his petition for naturalization shall then be pending and is otherwise entitled to admission, notwithstanding he shall be an alien enemy at the time and in the manner prescribed by the laws passed upon that subject: *Provided*, That no alien embraced within this subdivision shall have his petition for naturalization called for a hearing, or heard, except after ninety days' notice given by the clerk of the court to the Commissioner or Deputy Commissioner of Naturalization to be present, and the petition shall be given no final hearing except in open court and after such notice to the representative of the Government from the Bureau of Naturalization, whose objection shall cause the petition to be continued from time to time for so long as the Government may require: * * * *Provided further*, That the President of the United States may, in his discretion, upon investigation and report by the Department of Justice fully establishing the loyalty of any alien enemy not included in the forgoing exemption, except such alien enemy from the classification of alien enemy, and thereupon he shall have the privilege of applying for naturalization; and for the purposes of carrying into effect the provisions of this section, including personal services in the District of Columbia, the sum of \$400,000 is hereby appropriated, to be available until June thirtieth, nineteen hundred and nineteen, including travel expenses for members of the Bureau of Naturalization and its field service only, and the provisions of section thirty-six hundred and seventy-nine of the Revised Statutes shall not be applicable in any way to this appropriation. *Par. 11, added to sec. 4, act of June 29, 1906, by sec. 1, act of May 9, 1918 (40 Stat. 545).*

Notes of Decisions.

Filing of petition.—There is no statute forbidding the filing by an alien of a petition for naturalization while a state of war with his country exists. *In re Lindner* (D. C. 1917), 247 Fed. 138.

Granting citizenship during war.—For cases arising under R. S. 2171, which forbids the naturalization of any alien subject of a country with which the United States is at war, as to whether an enemy

alien who has filed his petition for naturalization prior to a declaration of war with his country is entitled to receive his certificate of naturalization thereafter, see

Grahl v. U. S. (C. C. A. 1919), 261 Fed. 487, and cases cited in footnotes thereto; U. S. v. Kamm (D. C. 1918), 247 Fed. 968.

2952. Validity of declarations of intention made prior to Sept. 27, 1906.—That all certificates of naturalization granted by courts of competent jurisdiction prior to December thirty-first, nineteen hundred and eighteen, upon petitions for naturalization filed prior to January thirty-first, nineteen hundred and eighteen, upon declarations of intention filed prior to September twenty-seventh, nineteen hundred and six, are hereby declared to be valid in so far as the declaration of intention is concerned, but shall not be by this Act further validated or legalized. * * * *Sec. 3, act of May 9, 1918 (40 Stat. 548).*

2953. Counterfeiting certificates of citizenship.—Whoever shall engrave, or cause or procure to be engraved, or assist in engraving, any plate in the likeness of any plate designed for the printing of a certificate of citizenship; or whoever shall sell any such plate, or shall bring into the United States from any foreign place any such plate, except under the direction of the Secretary of Commerce and Labor or other proper officer; or whoever shall have in his control, custody, or possession any metallic plate engraved after the similitude of any plate from which any such certificate has been printed, with intent to use or to suffer such plate to be used in forging or counterfeiting any such certificate or any part thereof; or whoever shall print, photograph, or in any manner cause to be printed, photographed, made, or executed, any print or impression in the likeness of any such certificate, or any part thereof; or whoever shall sell any such certificate, or shall bring the same into the United States from any foreign place, except by direction of some proper officer of the United States; or whoever shall have in his possession a distinctive paper which has been adopted by the proper officer of the United States for the printing of such certificate, with intent unlawfully to use the same, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both. *Sec. 75, Criminal Code, act of March 4, 1909 (35 Stat. 1102).*

2954. Expatriation of citizens of the United States.—That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state. * * * *Sec. 2, act of March 2, 1907 (34 Stat. 1228).*

The right of expatriation was declared by R. S. 1090.

The cancellation of the certificate of citizenship of a naturalized citizen taking permanent residence in a foreign country was authorized by sec. 15, act of June 29, 1906 (34 Stat. 601).

Notes of Decisions.

Application of law.—This act held to apply only to citizens, and that an honorably discharged soldier of the United States was not barred of his right to become a citizen, as provided by 2938, ante, by returning to Switzerland and holding an elective office there while an alien. In re Wildberger (D. C. 1914), 214 Fed. 508.

This act is limited to naturalized citizens while residing in foreign countries beyond the period stated in that act, the object being to relieve the Government from the obligation of protecting such citizens after a

residence abroad of sufficient duration to raise the presumption that they do not intend to return to the United States. (1910) 28 Op. Atty. Gen. 504.

The act does not apply to citizens who return to the United States, as the act of returning rebuts the presumption of noncitizenship. *Id.*

A native of Syria, who was naturalized in the United States and later returned to his native country, where he married a Syrian woman and remained in that country for more than two years, and then came back to

the United States, bringing his wife with him, did not thereby cease to be a citizen of the United States. *Id.*

Oath of allegiance.—*Browne v. Dexter* (1884), 66 Cal. 39, 4 Pac. 913.

Naturalization.—By the common law, allegiance to the Government of the country of one's birth can not be discharged by naturalization in a foreign country. *Ainslie v. Martin* (1813), 9 Mass. 454.

Expatriation in time of war.—*In re Look Tin Sing* (C. C. 1884), 21 Fed. 905; (1887) 9 Op. Atty. Gen. 63.

Secession.—The acts of the people of the States in rebellion merely suspended the practical relations of those States to the Union, but did not for a moment effect their separation therefrom. *Shortridge v. Macon* (C. C. 1867), Fed. Cas. No. 12,812.

A citizen of a seceding State, who adheres to the Union cause, and retires within the Federal lines, and remains there during the rebellion, though he intends to return after hostilities cease, continues to be a citizen of the United States. *Planters' Bank v. St. John* (C. C. 1869), Fed. Cas. No. 11,208.

2955. Expatriation by prolonged residence in a foreign country.— * * * When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however*, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: * * * *Sec. 2, act of March 2, 1907 (34 Stat. 1228).*

2956. Expatriation prohibited in time of war.— * * * *And provided also*, That no American citizen shall be allowed to expatriate himself when this country is at war. *Sec. 2, act of March 2, 1907 (34 Stat. 1228).*

2957. Repatriation of veterans of allied armies.—Twelfth. That any person who, while a citizen of the United States and during the existing war in Europe, entered the military or naval service of any country at war with a country with which the United States is now at war, who shall be deemed to have lost his citizenship by reason of any oath or obligation taken by him for the purpose of entering such service, may resume his citizenship by taking the oath of allegiance to the United States prescribed by the naturalization law and regulations, and such oath may be taken before any court of the United States or of any State authorized by law to naturalize aliens or before any consul of the United States, and certified copies thereof shall be sent by such court or consul to the Department of State and the Bureau of Naturalization, and the Act (Public fifty-five, Sixty-fifth Congress, approved October fifth, nineteen hundred and seventeen), is hereby repealed. *Par. 12, added to sec. 4, act of June 29, 1906, sec. 1, act of May 9, 1918 (40 Stat. 545).*

2958. Restraint of alien enemies in time of war.—Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted,

and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety. *R. S. 4067, as amended by act of April 16, 1918 (40 Stat. 531).*

Notes of Decisions.

Construction.—This section is not limited by R. S. 4069, the latter section simply providing a method of dealing with alien enemies additional to that in this section. *Ex parte Graber* (D. C. 1918), 247 Fed. 882.

Validity.—Alien enemies have no rights and privileges, unless by special favor, during time of war, and an act authorizing the restraint and removal of alien enemies is not invalid as depriving such persons of liberty without process of law; the constitutional safeguards not extending to enemies. *De Lacey v. U. S.* (C. C. A. 1918), 249 Fed. 624.

Habeas corpus.—The action of the President in ordering the summary arrest and detention of an alien enemy under this section is conclusive, and not subject to judicial review on habeas corpus. *Ex parte Graber* (D. C. 1918), 247 Fed. 882; *Ex parte Franklin* (D. C. 1918), 253 Fed. 984.

The court may inquire, on habeas corpus, whether the person apprehended is in fact a native, citizen, denizen, or subject of a hostile nation or government, since the statute provides for no preliminary hearing; but the proceeding is not further reviewable, being essentially an executive function, within the discretion of the President. *Ex parte Gilroy* (D. C. 1919), 257 Fed. 110.

Burden of proof.—On habeas corpus the burden of proof is on the petitioner to satisfy the court that he is not a native, citizen, denizen, or subject of a hostile nation or Government. *Ex parte Risse* (D. C. 1919), 257 Fed. 102.

"Native" defined.—"Native" indicates the place of birth, although one may not owe allegiance to the place where he was born. *Minotto v. Bradley* (D. C. 1918), 252 Fed. 600.

Citizenship.—A man was born in the United States, but his parents took him to Germany during his minority and were naturalized there. Before attaining his majority, he returned to this country to live, and there was no conduct on his part after he became of age amounting to an election of German citizenship. Held, he is an American citizen. *Steinkauler's Case*, 12 Ops. Atty. Gen. 15, 17; *Ludlam v. Ludham*, 25 N. Y. 358, 376; *State ex rel. Phelps v. Jackson*, Vt. Sup. Ct. 1907, 65 Atl. 657.

A naturalized citizen who returns to the country of his origin does not lose his citizenship, though he remains there indefinitely, if his purpose is to return to the land of his adoption; the test being one of intention. *Banning v. Penrose* (D. C. 1919), 255 Fed. 159.

2959. Restraint of declarants in time of war.— * * * *Provided, however,* That nothing herein contained shall be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien; and section twenty-one hundred and seventy-one of the Revised Statutes of the United States is hereby repealed: * * * *Par. 11, added to sec. 4, act of June 29, 1906 (34 Stat. 596), by sec. 1, act of May 9, 1918 (40 Stat. 545).*

R. S. 2171 was as follows:

"No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States."

Notes of Decisions.

Restraint of alien.—The petitioner was interned under the provisions of the presidential proclamation with reference to alien enemies. He claimed to be a citizen of Italy. He sought release from internment by writ of habeas corpus. The peti-

tioner was born in Germany, his mother was born in Germany, his father was born in Austria, and the family resided in Germany until a short time before the petitioner came to the United States. The writ of habeas corpus was denied, on the

ground that since the petitioner was a native of Germany the action of the President in interning him can not be controlled by the courts. *Minotto v. Bradley*, U. S. Dist. Ct., N. Dist. Ill. Interpretation of War Statutes, Bulletin 105.

Treasonable acts by alien.—Note concluding that an interned alien may be convicted and punished for treasonable acts committed during internment, citing *Car-*

liste v. United States (16 Wall. 147), 22 Law Notes 102.

Declarant an alien enemy.—A subject of Austria-Hungary, residing within the United States when war was declared, who had declared his intention to become a citizen but had never been naturalized, is an alien enemy. *Ex parte Graber* (D. C. 1918), 247 Fed. 882.

2960. Attempt of interned aliens to escape.—Whoever, being a person belonging to the armed land or naval forces of a belligerent nation or belligerent faction of any nation and being interned in the United States, in accordance with the law of nations, shall leave or attempt to leave said jurisdiction, or shall leave or attempt to leave the limits of internment in which freedom of movement has been allowed, without permission from the proper official of the United States in charge, or shall willfully overstay a leave of absence granted by such official, shall be subject to arrest by any marshal or deputy marshal of the United States, or by the military or naval authorities thereof, and shall be returned to the place of internment and there confined and safely kept for such period of time as the official of the United States in charge shall direct; and whoever, within the jurisdiction of the United States and subject thereto, shall aid or entice any interned person to escape or attempt to escape from the jurisdiction of the United States, or from the limits of internment prescribed, shall be fined not more than \$1,000 or imprisoned not more than one year, or both. *Sec. 7, title V, act of June 15, 1917 (40 Stat. 223).*

2961. Control of telegraph lines in Alaska.— * * * *Provided further*, That no telegraph or cable lines owned or operated or controlled by persons not citizens of the United States, or by any foreign corporation or government, shall be established in or permitted to enter Alaska. *Act of May 26, 1900 (31 Stat. 206).*

CHAPTER 49.

CONTROL OF NECESSARIES.

Control of necessities, 2962.

Food and Fuel Act:

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Definitions, 2964.

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Supplies and storage facilities:

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Cereals, beans, potatoes, 2967.

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Ores, minerals, etc.:

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Requisition, 2972.

Employees of the Government:

Voluntary service and cooperation, with private persons, 2973.

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2962. Control of necessities in time of war.—That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, wearing apparel, containers primarily designed or intended for containing foods, feeds, or fertilizers; fuel, including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessities; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation, and private controls affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessities during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act. *Sec. 1, act of Aug. 10, 1917 (40 Stat. 276), as amended by sec. 1, act of Oct. 22, 1919 (41 Stat. 297).*

This is similar to sec. 1, of the act of Aug. 10, 1917, with the exception of the words, "wearing apparel, containers primarily designed or intended for containing foods, feeds, or fertilizers;"

Notes of Decisions.

Construction.—"Necessaries," as defined in this section, as amended, includes only articles mentioned therein, and the rule of ejusdem generis can not make "necessaries," as used in this section and section 4 of the act of Aug. 10, 1917, include articles of the same nature as specified, since

the sections in question contain no general words in addition to the specific ones. *U. S. v. Amer. Woolen Co. (D. C. 1920), 265 Fed. 404.*

Woolen cloth is not "wearing apparel" within the meaning of this act. *Id.*

See also notes to 2963, post.

2963. Validity of the Food and Fuel Act.—That if any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the

clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered. *Sec. 22, act of Aug. 10, 1917 (40 Stat. 283).*

Notes of Decisions.

Validity.—*Sec. 4* of the food control act (by which title this act is to be cited, under a provision of the act of Oct. 22, 1919), as amended by the act of Oct. 22, 1919, providing that it is unlawful "wilfully * * * to make an unjust or unreasonable rate or charge in handling or dealing in or with any necessities," or to conspire "to exact excessive prices for any necessities," is void and unconstitutional, as repugnant to the Fifth and Sixth Amendments, because referring to no fixed standard of guilt and inadequate to inform persons accused of violation thereof of the

nature and cause of the accusation against them, and because purporting to delegate the legislative power of Congress to courts and juries to determine what acts shall be held to be criminal and punishable. *U. S. v. L. Cohen Grocery Co. (1921), 254 U. S. —; 65 L. Ed. 300.*

Sec. 25 of this act, authorizing the President to fix the price of coal and coke as a war measure, is not unconstitutional as depriving persons of property without due process of law. *U. S. v. Ford (D. C. 1920), 265 Fed. 424.*

2964. Definitions of terms used in the Food and Fuel Act.—That words used in this Act shall be construed to import the plural or the singular, as the case demands. The word "person," wherever used in this Act, shall include individuals, partnerships, associations, and corporations. * * * *Sec. 23, act of Aug. 10, 1917 (40 Stat. 283).*

2965. Period of operation of the Food and Fuel Act.—That the provisions of this Act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President; but the termination of this Act shall not affect any act done, or any right or obligation accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said termination pursuant to this Act; but all rights and liabilities under this Act arising before its termination shall continue and may be enforced in the same manner as if the Act had not terminated. Any offense committed and all penalties, forfeitures, or liabilities incurred prior to such termination may be prosecuted or punished in the same manner and with the same effect as if this Act had not been terminated. *Sec. 24, act of Aug. 10, 1917 (40 Stat. 283).*

For joint resolution, providing that certain statutes, the operation of which is contingent upon the existence of a state of war, shall be construed as if the World War had ended on Mar. 3, 1921, see 2835, ante.

Notes of Decisions.

Termination of war.—A similar phrase used with reference to the termination of the state of war ("date of which shall be determined and proclaimed by the President") held in the war-time prohibition act of Nov. 21, 1918 (40 Stat. 1046), so definite as to leave no room for construction. The requirement could not be satisfied by passing references in messages to

Congress, nor by newspaper interviews with high officers of the Army or with officials of the War Department. *Hamilton v. Ky. Distilleries & Warehouse Co. (1919), 251 U. S. 146; 64 L. Ed. 194.* See also *Ruppert v. Caffey (1919), 251 U. S. 261; 64 L. Ed. 269; U. S. v. Armstrong (D. C. 1920), 265 Fed. 683; U. S. v. Russel (D. C. 1920), 265 Fed. 414.*

2966. Requisition of supplies and storage facilities.—That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition,

or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessities or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: *Provided*, That nothing in this section, or in the section that follows, shall be construed to require any natural person to furnish to the Government any necessities held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the Government any seed necessary for the seeding of land owned, leased, or cultivated by them. *Sec. 10, act of Aug. 10, 1917 (40 Stat. 279).*

Notes of Decisions.

Jury trial.—The suit authorized by this section is a part of what is in effect a condemnation proceeding, instituted by the requisition and taking possession of the property, and upon the question of just compensation, the owner is entitled of right to trial by jury. *Filbin Corp. v. U. S.* (D. C. 1920), 265 Fed. 354.

2967. Purchase and sale of cereals, beans and potatoes.—That the President is authorized from time to time to purchase, to store, to provide storage facilities for, and to sell for cash at reasonable prices, wheat, flour, meal, beans, and potatoes: *Provided*, That if any minimum price shall have been theretofore fixed, pursuant to the provisions of section fourteen of this Act, then the price paid for any such articles so purchased shall not be less than such minimum price. Any moneys received by the United States from or in connection with the disposal by the United States of necessities under this section may, in the discretion of the President, be used as a revolving fund for further carrying out the purposes of this section. Any balance of such moneys not used as part of such revolving fund shall be covered into the Treasury as miscellaneous receipts. *Sec. 11, act of Aug. 10, 1917 (40 Stat. 279).*

2968. Commandeering of distilled spirits.—That the President is authorized and directed to commandeer any or all distilled spirits in bond or in stock at the date of the approval of this Act for redistillation, in so far as such redistillation may be necessary to meet the requirements of the Government in the manufacture of munitions and other military and hospital supplies, or in so far as such redistillation would dispense with the necessity of utilizing products and materials suitable for foods and feeds in the future manufacture of distilled spirits for the purposes herein enumerated. The President shall determine and pay a just compensation for the distilled spirits so commandeered; and if the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation for such spirits, in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. *Sec. 16, act of Aug. 10, 1917 (40 Stat. 282).*

2969. Operation by the Government of factories, mines, pipe lines, etc.—That whenever the President shall find it necessary to secure an adequate supply of necessities for the support of the Army or the maintenance of the Navy, or for any other public use connected with the common defense, he is authorized to requisition and take over, for use or operation by the Government, any factory, packing house, oil pipe line, mine, or other plant, or any part thereof, in or through which any necessities are or may be manufactured, produced, prepared, or mined, and to operate the same. Whenever the President shall determine that the further use or operation by the Government of any such factory, mine, or plant, or part thereof, is not essential for the national security or defense, the same shall be restored to the person entitled to the possession thereof. The United States shall make just compensation, to be determined by the President, for the taking over, use, occupation, and operation by the Government of any such factory, mine, or plant, or part thereof. If the compensation so determined be unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation, in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. The President is authorized to prescribe such regulations as he may deem essential for carrying out the purposes of this section, including the operation of any such factory, mine, or plant, or part thereof, the purchase, sale, or other disposition of articles used, manufactured, produced, prepared, or mined therein, and the employment, control, and compensation of employees. Any moneys received by the United States from or in connection with the use or operation of any such factory, mine, or plant, or part thereof, may, in the discretion of the President, be used as a revolving fund for the purpose of the continued use or operation of any such factory, mine, or plant, or part thereof, and the accounts of each such factory, mine, plant, or part thereof, shall be kept separate and distinct. Any balance of such moneys not used as part of such revolving fund shall be paid into the Treasury as miscellaneous receipts. *Sec. 12, act of Aug. 10, 1917 (40 Stat. 279).*

2970. Ores and minerals declared to be necessities.—That by reason of the existence of a state of war, it is essential to the national security and defense, and to the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to provide for an adequate and increased supply, to facilitate the production, and to provide for an equitable, economical, and better distribution of the following-named mineral substances and ores, minerals, intermediate metallurgical products, metals, alloys, and chemical compounds thereof, to wit: Antimony, arsenic, ball clay, bismuth, bromine, cerium, chalk, chromium, cobalt, corundum, emery, fluorspar, ferrosilicon, fullers' earth, graphite, grinding pebbles, iridium, kaolin, magnesite, manganese, mercury, mica, molybdenum, osmium, sodium, platinum, palladium, paper clay, phosphorus, potassium, pyrites, radium, sulphur, thorium, tin, titanium, tungsten, uranium, vanadium, and zirconium, as the President may, from time to time, determine to be necessary for the purposes aforesaid, and as to which there is at the time of such determination, a present or prospective inadequacy of supply. The aforesaid substances mentioned in any such determination are hereinafter referred to as necessities. *Sec. 1, act of Oct. 5, 1918 (40 Stat. 1009).*

2971. Control of metals, minerals, etc., by the President.—That the President is authorized from time to time to purchase such necessities and to enter into, to accept, to transfer, and to assign contracts for the production or purchase of same, to provide storage facilities for and store the same, to provide or improve transportation facilities, and to use, distribute, or allocate said necessities, or to sell the same at reasonable prices, but such sales made during the war shall not be at a price less than the purchase or cost of production thereof: *Provided*, That no such contract of purchase shall cover a period longer than two years after the termination of the war. * * * *Sec. 2, act of Oct. 5, 1918 (40 Stat. 1009).*

For joint resolution providing that certain statutes, the operation of which is contingent upon the existence of a state of war, shall be construed as if the World War had ended on Mar. 3, 1921, see 2835, ante. * -

2972. Requisition of metals, minerals, etc., by the President.—That the President is authorized to requisition and take over any of said necessities and to use, distribute, allocate, or sell the same; and also to requisition and take over any undeveloped or insufficiently developed or operated idle land, deposit, or mine, and any idle or partially operated smelter, or plant, or part thereof, producing or, in his judgment, capable of producing said necessities, or either of them, and to develop and operate such mine or deposit or such smelter or plant, either through the agencies hereinafter mentioned, or under lease or royalty agreement, or in any other manner, and to store, use, distribute, allocate, or sell the products thereof: *Provided*, That no ores or metals, the principal money value of which consists in metals or minerals other than those specifically enumerated in section one hereof, shall be subject to requisition under the provisions of this Act. Whenever the President shall determine that the further use or operation by the Government of any such land, deposit, mine, smelter, or plant, or part thereof, so acquired, is no longer essential for the objects aforesaid, the same shall be returned to the person, firm, or corporation entitled thereto. The United States shall make just compensation, determined by the President, for the taking over, use, occupation, or operation by the Government of any such necessities, or any such land, deposit, mine, smelter, or plant, or part thereof. If the compensation so determined be unsatisfactory to the person, firm, or corporation entitled thereto, such person, firm, or corporation shall be paid seventy-five per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as added to said seventy-five per centum will make up such amount as will be just compensation, in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five, of the Judicial Code. * * * *Sec. 3, act of Oct. 5, 1918 (40 Stat. 1010).*

For joint resolution providing that certain statutes, the operation of which is contingent upon the existence of a state of war, shall be construed as if the World War had ended on Mar. 3, 1921, see 2835, ante.

2973. Voluntary service and cooperation in the conservation of necessities.—That in carrying out the purposes of this Act the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, to accept the services of any person without compensation, to cooperate with any agency or person, to utilize any department or agency of the Government, and to coordinate their activities so as to avoid any preventable loss or duplication of effort or funds. *Sec. 2, act of Aug. 10, 1917 (40 Stat. 276).*

See note to 2972, ante.

2974. Interest of agents or employees of the Government in contracts restricted.—That no person acting either as a voluntary or paid agent or employee of the United States in any capacity, including an advisory capacity, shall solicit, induce, or attempt to induce any person or officer authorized to execute or to direct the execution of contracts on behalf of the United States to make any contract or give any order for the furnishing to the United States of work, labor, or services, or of materials, supplies, or other property of any kind or character, if such agent or employee has any pecuniary interest in such contract or order, or if he or any firm of which he is a member, or corporation, joint-stock company, or association of which he is an officer or stockholder, or in the pecuniary profits of which he is directly or indirectly interested, shall be a party thereto. Nor shall any agent or employee make, or permit any committee or other body of which he is a member to make, or participate in making, any recommendation concerning such contract or order to any council, board, or commission of the United States, or any member or subordinate thereof, without making to the best of his knowledge and belief a full and complete disclosure in writing to such council, board, commission, or subordinate of any and every pecuniary interest which he may have in such contract or order and of his interest in any firm, corporation, company, or association being a party thereto. Nor shall he participate in the awarding of such contract or giving such order. Any willful violation of any of the provisions of this section shall be punishable by a fine of not more than \$10,000, or by imprisonment of not more than five years, or both: *Provided*, That the provisions of this section shall not change, alter or repeal section forty-one of chapter three hundred and twenty-one, Thirty-fifth Statutes at Large. *Sec. 3, act of Aug. 10, 1917 (40 Stat. 276-277).*

2975. Exemption from draft of employees.—That the employment of any person under the provisions of this Act shall not exempt any such person from military service under the provisions of the selective draft law approved May eighteenth, nineteen hundred and seventeen. *Sec. 20, act of Aug. 10, 1917 (40 Stat. 283).*

That employment under the provisions of this Act shall not exempt any person from military service under the provisions of the selective draft law approved May eighteenth, nineteen hundred and seventeen, or any Act amendatory thereto. *Sec. 11, act of Oct. 5, 1918 (40 Stat. 1012).*

CHAPTER 50.

STATUTES—ARMY REGULATIONS—ARMY REGISTER.

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2876. Publication of the Revised Statutes, first edition.—That the Secretary of State is hereby charged with the duty of causing to be prepared for printing, publication and distribution the revised statutes of the United States enacted at this present session of Congress; that he shall cause to be completed the headnotes of the several titles and chapters and the marginal notes referring to the statutes from which each section was compiled and repealed by said revision; and references to the decisions of the courts of the United States explaining or expounding the same, and such decisions of State courts as he may deem expedient, with a full and complete index to the same. And when the same shall be completed, the said Secretary shall duly certify the same under the seal of the United States, * * * *Sec. 2, act of June 20, 1874 (18 Stat. 113).*

That the revision of the statutes of a general and permanent nature, with the index thereto, shall be printed in one volume, and shall be entitled and labeled "Revised Statutes of the United States;" and the revision of the statutes relating to the District of Columbia; to post-roads, and the public treaties in force on the first day of December, one thousand eight hundred and seventy-three, with a suitable index to each, shall be published in a separate volume, and entitled and labeled "Revised Statutes relating to District of Columbia and Post-Roads, Public Treaties." *Sec. 3, act of June 20, 1874 (18 Stat. 113).*

By sec. 1, act of June 27, 1866 (14 Stat. 74), the President was authorized "to appoint three commissioners to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature." Act of May 4, 1870 (16 Stat. 96), provided that the work and revision should be completed within three years from the date of its passage. The act of March 3, 1873 (17 Stat. 579), authorized the appointment of a joint committee of Congress to accept the draft of the revision of laws, so far as the same was completed at the expiration of the time designated for that purpose (May 4, 1873). The same statute authorized the existing joint committee to con-

tract with some suitable person or persons to prepare a revision of the statutes, already reported by the commissioners, in the form of a bill to be presented at the opening of the Forty-third Congress.

The Revised Statutes of the United States were enacted and the publication of the first edition was authorized by the Forty-third Congress, at the first session, by an act entitled "An act to revise and consolidate the statutes of the United States, in force on the first day of December, anno Domini one thousand eight hundred and seventy-three," which was approved June 22, 1874 (18 Stat. 113).

Numerous amendments of said act, "for the purpose of correcting errors and supplying omissions" therein, were made by act of Feb. 18, 1875 (18 Stat. 316), and act of Feb. 27, 1877 (19 Stat. 240). And by act of Mar. 2, 1877, (19 Stat. 268), the preparation of a new edition of the Revised Statutes was provided for, in the text of which was incorporated all the amendments made in the revision to the close of the Forty-fourth Congress, Mar. 4, 1877, with marginal references to other statutes passed subsequent to the Revised Statutes affecting or modifying any of the provisions thereof. This new edition was published as *The Revised Statutes of the United States, Second Edition*, 1878.

2977. Printed copies of the Revised Statutes, first edition, as evidence.—* * * and when printed and promulgated as hereinafter provided, the printed volumes shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States, and of the several States and Territories. *Sec. 2, act of June 20, 1874 (18 Stat. 113).*

Notes of Decisions.

Judicial notice of Federal laws.—The courts take judicial notice of the laws and treaties of the United States. *Beck v. Johnson* (C. C. 1909), 169 Fed. 154; *Mobile, J. & K. C. R. Co. v. Bromberg* (1904), 37 So. 295, 141 Ala. 258; *St. Louis, I. M. & S. Ry. Co. v. Brown* (1899), 54 S. W. 865, 67 Ark. 295.

Effect of Revised Statutes.—The Revised Statutes must be accepted as the law on the subjects which they embrace as it existed on Dec. 1, 1873 and they were enacted to present the entire body of the laws in a concise and compact form. The incorporation of a particular statutory provision into the revision was a legislative declaration that the law on that subject was as therein provided; and in the absence

of any obscurity in the meaning the court can not look to the preexisting statutes to see whether or not they were correctly incorporated. *U. S. v. Bowen*, 100 U. S. 508; *Bates Refrigerating Co. v. Sulsberger*, 157 U. S. 1; *Wright v. U. S.*, 15 Ct. Cl. 80, 86; *U. S. v. North American Commercial Co.*, 74 Fed. Rep. 145.

As to the effect of amendments to the Revised Statutes, see *U. S. v. Jessup*, 15 Fed. Rep. 790.

First edition.—The first edition of the Revised Statutes is a transcript of the original in the State Department. It is *prima facie* evidence of the law, but the original is the only conclusive evidence of the exact text of the law. *Wright v. U. S.* (1879), 15 Ct. Cl. 80.

2978. Titles used in Revised Statutes, first edition, without legislative force.—The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed. *R. S. 5600.*

Notes of Decisions.

Effect in general.—This section makes it proper to look to the original act to ascertain the legislative intent in cases of doubt. *Doyle v. Wisconsin* (1876), 94 U. S. 50, 24 L. Ed. 64.

Rearrangement in general.—The mere collocation or rearrangement of previous statutes in new revisions adopted on the same date will not operate to change the law and thereby defeat the will of Congress.

Page v. Burnstine (1880), 102 U. S. 664, 669, 26 L. Ed. 268.

Classification under chapters in title.—The rule forbidding inferences from the classification of a subject under a title in the Revised Statutes does not apply to its classification under a chapter in a title. *Reld v. U. S.* (1883), 18 Ct. Cl. 625.

Separation of parts of section.—Intention to alter scope of existing law can not be

imputed to Congress because in the Revised Statutes it placed in two separate sections portions of what was a single section of the original act. *Anderson v. Pacific Coast S. S. Co.* (1912), 32 Sup. Ct. 626, 225 U. S. 187, 56 L. Ed. 1047.

The separation in the Revised Statutes of the United States of the several parts of a section of an existing statute according to an arrangement adopted for purposes of convenience only did not work any change in their purpose or meaning, in the absence of some substantial change in phraseology. *Buck Stove & Range Co. v. Vickers* (1912), 33 Sup. Ct. 41, 226 U. S. 205, 57 L. Ed. 189.

Separation of parts of act.—The separation of the provisions of an act into different sections of the Revised Statutes in no

way affects their construction. *Taylor v. U. S.* (C. C. 1891), 45 Fed. 531, 539; reversed (1893), 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335.

Changes in phraseology.—This section has a very narrow effect, and clearly does not extend to cases of change of phraseology, as it is expressly limited to matters of arrangement and classification. *King v. McLean Asylum of the Massachusetts General Hospital* (1894), 64 Fed. 331, 344, 12 C. C. A. 145.

In the construction of the Revised Statutes, an intention to change the existing laws, which the revision purports to reenact or codify, is not to be presumed from trifling changes of phraseology. In *Re Long Island N. S. P. & F. Transp. Co.* (D. C. 1881), 5 Fed. 599, 626.

2979. Scope of Revised Statutes, first edition.—The foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature, in force on the 1st day of December, one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of Congress, and the same shall be designated and cited, as The Revised Statutes of the United States. *R. S. 5595.*

Notes of Decisions.

Nature, construction, and effect of Revised Statutes.—In general.—The revision must be treated as the legislative declaration of the statute law on the subjects embraced therein on Dec. 1, 1873. When the meaning is plain, the courts can not look to the statutes revised to see if Congress erred in the revision, but they may do so, if necessary to construe doubtful language. *U. S. v. Bowen* (1879), 100 U. S. 508, 513, 25 L. Ed. 631 [C. S. p. 13032].

The enactment of the Revised Statutes was not original legislation, but merely a more convenient expression of the law existing on Dec. 1, 1873. *U. S. v. Moore* (C. C. 1878), Fed. Cas. No. 15,804.

In the construction of the Revised Statutes no change of meaning will be imputed to a change of phraseology in the reenacted statute unless the language used indicates an intended departure therefrom. *U. S. v. Tilden* (D. C. 1878), Fed. Cas. No. 16,520.

The incorporation of a particular statutory provision into the Revised Statutes, adopted in 1874, was a legislative declaration that the law on that subject was as therein provided; and, in the absence of any obscurity in the meaning, the court can not look to the preexisting statutes to see whether or not they were correctly incorporated. *U. S. v. North American Commercial Co.* (C. C. 1896), 74 Fed. 145; judgment re-

versed, *North American Commercial Co. v. U. S.* (1898), 18 Sup. Ct. 817, 171 U. S. 110, 43 L. Ed. 98.

The Revised Statutes are an act of Congress. The enactment was approved and became the law June 22, 1874. *Wright v. U. S.* (1879), 15 Ct. Cl. 80. The object of the Revised Statutes was to simplify and bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, to expunge redundant and obsolete enactments, and to make such alterations as might be necessary to reconcile contradictions and amend imperfections in the original text of the preexisting statutes, and all those statutes were abrogated by this section. *Dwight v. Merritt* (1891), 11 Sup. Ct. 768, 769, 140 U. S. 213, 35 L. Ed. 450; *Bowen v. U. S.* (1878), 14 Ct. Cl. 162. It would defeat their object if courts were to disregard their language and administer previous enactments as if the Revised Statutes did not exist. *Bowen v. U. S.* (1878), 14 Ct. Cl. 162.

The Revised Statutes did not make a new state of the law, such as would authorize the head of an executive department to reexamine legal questions determined by his predecessors. *State of Illinois v. U. S.* (1885), 20 Ct. Cl. 342.

Seemingly that the original dates of the provisions of the Revised Statutes must be considered in determining their effect

upon each other, and that a previous decision of a court or a department based upon the circumstance that one such provision is an earlier, and the other a later, expression of the will of Congress, binds as much as ever. (1875) 15 Op. Atty. Gen. 493.

Marginal notes.—Marginal notes in the Revised Statutes may be referred to on questions of construction, as indicating the intention of Congress not to alter by revision the substantial provisions of previous acts. *Mackey v. Miller* (1903), 126 Fed. 161, 62 C. C. A. 139.

The marginal notes annexed to the sections of the Revised Statutes formed a part of the Revised Statutes when adopted by Congress, and are to be taken and read as a part thereof. *U. S. v. Green* (D. C. 1905), 136 Fed. 618, 624; affirmed (1905), 26 Sup. Ct. 748, 199 U. S. 601, 50 L. Ed. 328.

2980. Repeal of acts embraced in the Revised Statutes, first edition.—All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided*, That the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last-named day no part of which are embraced in said revision, shall not be affected or changed by its enactment. *R. S. 5596.*

Notes of Decisions.

Effect of section.—By the express language of this section, an act is no longer in force where the revision embraces such

act and all others on the subject. *U. S. v. Bowen* (1879), 100 U. S. 508, 513, 25 L. Ed. 631.

2981. Accrued rights under repealed statutes.—The repeal of the several acts embraced in said revision shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal, but all rights and liabilities under said acts shall continue, and may be enforced in the same manner, as if said repeal had not been made; nor shall said repeal, in any manner affect the right to any office, or change the term or tenure thereof. *R. S. 5597.*

Notes of Decisions.

Remedies saved.—The right to an injunction against the collection of an illegal internal revenue tax is not continued under

this section; Congress having the right to take away a mere remedy. *Kensett v. Stivers* (C. C. 1880), 10 Fed. 517, 528.

2982. Acts passed since December 1, 1873.—The enactment of the said revision is not to affect or repeal any act of Congress passed since the 1st day of December one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from, or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith. *R. S. 5601.*

Notes of Decisions.

Statutes in force Dec. 1, 1873.—The Revised Statutes must be regarded as passed on Dec. 1, 1873, and all other acts of the

same session of Congress passed that date are to be treated as subsequent acts repealing the Revised Statutes, so far as

they are inconsistent therewith. In re Oregon Bulletin Printing & Publishing Co. (C. C. 1876), Fed. Cas. No. 10,561.

The Revised Statutes as enacted June 22, 1874, did not alter statutory provisions in force Dec. 1, 1873. The L. W. Eaton (D. C. 1878), Fed. Cas. No. 8,612.

Acts passed since Dec. 1, 1873.—Sec. 12, act of June 22, 1874, was a subsequent statute to the Revised Statutes, and repealed any portion thereof inconsistent therewith. U. S. v. Auffmerdt (1887), 7 Sup. Ct. 1182, 1184, 122 U. S. 197, 30 L. Ed. 1182.

The Revised Statutes, though adopted after the passage of act of June 9, 1874, did not repeal the provisions of that act. U. S. v. Mason (C. C. 1888), 34 Fed. 129, 130.

The Revised Statutes did not affect statutes passed between Dec. 1, 1873, and June 22, 1874. Ludington v. U. S. (1879), 15 Ct. Cl. 453.

An act approved on the same day with the Revised Statutes, June 22, 1874, is to

be construed, pursuant to the true intent of this section, as if passed subsequently. *Thomas v. U. S.* (1886), 16 Ct. Cl. 522.

Construction of act of Feb. 18, 1875.—Act of Feb. 18, 1875 (18 Stat. 316), entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States," amends the Revised Statutes by adding to them certain provisions of existing statutes; but these amendments were not in the nature of new enactments, and are to be construed as though the Revised Statutes were originally adopted with these alterations incorporated therein. *Ludington v. U. S.* (1879), 15 Ct. Cl. 453.

Construction of act of Feb. 27, 1877.—Act of Feb. 27, 1877, entitled "An act to perfect the revision of the statutes of the United States," etc., must be deemed to take effect only from its date, there being nothing in its language which expressly, or by necessary implication, gives to it a retrospective operation. (1877) 15 Op. Atty. Gen. 222.

2933. Revised Statutes, second edition.—That the President of the United States be, and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, one person, learned in the law, as a commissioner, for the purpose of preparing and publishing a new edition of the first volume of the Revised Statutes of the United States. *Sec. 1, act of March 2, 1877 (19 Stat. 268).*

That said new edition shall be completed in manuscript by said commissioner by the first day of January, anno Domini eighteen hundred and seventy-eight, and by him presented to the Secretary of State for his examination and approval, who is hereby required to examine and compare the same as amended, with all the amendatory acts, and, within two months after having been submitted to him, and when the same shall be completed, the said Secretary shall duly certify the same under the seal of the Secretary of State, and when printed and promulgated as herein provided the printed volume shall be legal and conclusive evidence of the laws and treaties therein contained, in all the courts of the United States, and of the several States and Territories, and said Secretary shall cause fifteen thousand copies of the same to be printed and bound at the Government Printing Office, under the supervision of said commissioner, at the expense of the United States, and without unnecessary delay. *Sec. 4, act of March 2, 1877 (19 Stat. 269).*

That an act entitled "An Act to provide for the preparation and publication of a new edition of the Revised Statutes of the United States", approved March second, eighteen hundred and seventy-seven, be, and the same is hereby, amended as follows, to wit: By striking out from the ninth and tenth lines of section four as published in the nineteenth volume of the Statutes at Large, the words "and conclusive"; and, in the tenth line, the words "and treaties"; and, by inserting after the word "Territories" at the end of the eleventh line, the following words, to wit: "but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress

since the first day of December, eighteen hundred and seventy-three". *Act of Mar. 9, 1878 (20 Stat. 27)*. •

Secs. 2 and 3 of act of Mar. 2, 1877, above, prescribed the duties of the commissioner in preparing the new edition of the Revised Statutes, and the matters to be included therein.

Notes of Decisions.

Second edition.—The publication of the second edition of the Revised Statutes under act of Mar. 2, 1877, did not affect any statute passed subsequent to Dec. 1, 1873. *McLean v. St. Paul & C. Ry. Co. (C. C. 1879), Fed. Cas. No. 8,893*.

The act of Mar. 3, 1875, providing for removal of causes from State courts was not repealed by the marginal reference to the same in sec. 639 of the second edition of the Revised Statutes. *Norris v. Mineral Point Tunnel (C. C. 1881), 7 Fed. 272*.

The second edition of the Revised Statutes is neither a new revision nor a new enactment. It is only a new publication—a compilation containing the original law with certain specific alterations and amendments, made by subsequent legislation, incorporated therein, according to the judgment of the editor, who had no discretion to correct errors or supply omissions. *Wright v. U. S. (1879), 15 Ct. Cl. 80*.

2984. Revised Statutes, supplement of 1891.—That the publication of the Supplement to the Revised Statutes, embracing the statutes general and permanent in their nature, passed after the Revised Statutes, with references connecting provisions on the same subject, explanatory notes, and citations of judicial decisions, be continued and issued in one volume, to include the general laws of the Forty-seventh, Forty-eighth, Forty-ninth, Fiftieth, and Fifty-first Congresses, with a table of alterations and a general index to the whole, to be prepared and edited by the editor of the existing Supplement, authorized by the joint resolution of June twenty-eighth, eighteen hundred and eighty, numbered forty-four (Supplement to Revised Statutes, page five hundred and eighty-two), to be stereotyped at the Government Printing Office, using the present plates, as far as practicable, with such alterations as may be found necessary, the work and plates and all right and title therein and thereto to be in and fully belong to the Government for its exclusive use and benefit. *Sec. 1, act of Apr. 9, 1890 (26 Stat. 50)*.

The volume published in conformity to the authority conferred by this statute was published in 1891, and is entitled "Vol. 1, Supplement to the Revised Statutes of the United States. Second edition. 1874-1891;" and supersedes the volume published under authority of Joint Resolution No. 44 of June 7, 1880 (21 Stat. 808). Under authority of act of Feb. 27, 1893 (27 Stat. 477), the publication of the supplement was continued—part of a second volume being issued in 1895, containing general legislation of the Fifty-second and Fifty-third Congresses, between Jan. 22, 1892, and Mar. 2, 1895. Later numbers were issued at the end of each session as required by act of June 4, 1897 (30 Stat. 30), to include the general legislation of the Fifty-sixth Congress. Volume 2, therefore, comprises the general legislation of the Fifty-second to the Fifty-sixth Congresses, Jan. 22, 1892, to Mar. 3, 1901. Since then the publication has been discontinued, it is understood, because of the steps taken toward the preparation of a new revision of the statutes of the United States authorized by act of Mar. 3, 1901 (31 Stat. 1181).

2985. Supplements to Revised Statutes as evidence.—That the publication herein authorized shall be taken to be prima facie evidence of the laws therein contained, but shall not change nor alter any existing law, nor preclude reference to nor control in case of any discrepancy, the effect of any original act passed by Congress. *Sec. 3, act of April 9, 1890 (26 Stat. 50)*.

2986. Publication and distribution of the pamphlet edition of the statutes at large.—That at the end of each session of Congress a pamphlet edition of the permanent and general legislation of the session, with notes, references, and an

index, substantially on the plan of the existing Supplement, shall be stereotyped and printed at the Government Printing Office; the plates and all rights thereto to be the property of the United States. *Sec. 2, act of Feb. 27, 1893 (27 Stat. 478).*

That the number of copies of said pamphlet and the distribution and sale thereof shall be the same as provided for the printing, distribution, and sale of said Supplement by the act of April ninth, eighteen hundred and ninety, chapter seventy-three (First Supplement to Revised Statutes, second edition, page seven hundred and twelve). *Sec. 3, act of Feb. 27, 1893 (27 Stat. 478).*

By act of Jan. 12, 1895 (28 Stat. 614), 200 copies were required to be furnished to the War Department.

Notes of Decisions.

Status of publisher.—A person employed by Congress to prepare and edit the publication of the statutes at the end of each session is not an officer, but a contractor. *Drury v. U. S. (1908), 43 Ct. Cl. 237.*

2987. Preservation of copies of the Statutes at Large.—The various officers of the United States, to whom, in virtue of their offices and for the uses thereof, copies of the United States Statutes at Large, published by Little, Brown and Company, have been or may be distributed at the public expense, by authority of law, shall preserve such copies, and deliver them to their successors respectively as a part of the property appertaining to the office. A printed copy of this section shall be inserted in each volume of the statutes distributed to any such officers. *R. S. 1777.*

2988. The Statutes at Large as evidence.— * * * The pamphlet copies of the statutes and the bound copies of the Acts of each Congress shall be legal evidence of the laws and treaties therein contained in all the courts of the United States and of the several States therein. The said pamphlet and the Statutes at Large shall contain all laws, joint and concurrent resolutions passed by Congress, and also all conventions, treaties, proclamations, and agreements. * * * *Sec. 73, act of Jan. 12, 1895 (28 Stat. 615).*

Notes of Decisions.

Act of Congress as evidence.—The acts of Congress, as they stand approved by the President and enrolled in the Department of State, are conclusive evidence of the written law. (1857) 9 Op. Atty. Gen. 1.

2989. Little & Brown's edition of the statutes to be evidence.—The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof. *R. S. 908.*

The edition of the laws, etc., mentioned in this section, included vols. 1-17 of the Statutes at Large, which were published under contracts with the publishers named. Said contracts were terminated by sec. 1, act of June 20, 1874 (18 Stat. 118).

As to judicial notice taken of acts of Congress, see ante, 2977, 2988.

2990. Definitions of terms used in statutes.—In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, words importing the singular number may extend and be applied to several persons or things; words

importing the plural number may include the singular; words importing the masculine gender may be applied to females; the words "insane person" and "lunatic" shall include every idiot, non compos, lunatic, and insane person; the word "person" may extend and be applied to partnerships and corporations, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and a requirement of an "oath" shall be deemed complied with by making affirmation in judicial form. *R. S. 1.*

The word "vessel" includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water. *R. S. 3.*

The word "vehicle" includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land. *R. S. 4.*

The word "company" or "association," when used in reference to a corporation, shall be deemed to embrace the words "successors and assigns of such company or association," in like manner as if these last-named words, or words of similar import, were expressed. *R. S. 5.*

2991. Laws in effect in Hawaii.—That the Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: *Provided*, That sections eighteen hundred and forty-one to eighteen hundred and ninety-one, inclusive, nineteen hundred and ten and nineteen hundred and twelve, of the Revised Statutes, and the amendments thereto, and an Act entitled "An Act to prohibit the passage of local or special laws in the Territories of the United States, to limit territorial indebtedness, and for other purposes," approved July thirtieth, eighteen hundred and eighty-six, and the amendments thereto, shall not apply to Hawaii. *Sec. 5, act of Apr. 30 1900 (31 Stat. 141), as amended by sec. 1, act of May 27, 1910 (36 Stat. 443).*

That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States. *Sec. 6, act of Apr. 30, 1900 (31 Stat. 142).*

Sec. 5, as originally enacted, provided that the Constitution, and, except as otherwise provided, all the laws of the United States not locally inapplicable should have the same force and effect within the Territory as elsewhere in the United States, with a proviso that *R. S. 1850, 1890*, should not apply to the Territory. It was amended by adding the clause "including laws carrying general appropriations," and by changing the proviso to read as set forth here.

R. S. 1910, 1912, mentioned in this section, containing provisions relating to the courts of certain Territories named or referred to therein, were superseded by the admission of all said Territories to the Union as States.

Notes of Decisions.

Constitution and laws applicable.—When territory is acquired by treaty or conquest, or otherwise, its relation to the nation acquiring it depends upon the laws of that nation, unless controlled by the instrument of cession. (1898) 22 Op. Atty. Gen. 150.

The resolution annexing the Hawaiian Islands is intended to have the effect of a treaty of cession merely, whereby these islands become, in a broad sense, subject to American sovereignty. How that sovereignty will regulate their status with re-

gard to itself and its laws is not thereby intended to be determined. *Id.*

The laws of the United States affecting the Hawaiian Islands, as well as the laws of such islands, are to remain generally

undisturbed by reason of the resolution of annexation, until Congress provides a Government therefor. (1898) 22 Op. Atty. Gen. 249.

2992. Laws in effect in Porto Rico.—That the laws and ordinances of Porto Rico now in force shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided for Porto Rico or by Act of Congress of the United States; and such legislative authority shall have power, when not inconsistent with this Act, by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this Act as it may from time to time see fit. *Sec. 57, act of March 2, 1917 (39 Stat. 968).*

That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs, and duties on importations into Porto Rico prescribed by the Act of Congress entitled "An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," approved April twelfth, nineteen hundred, are hereby continued in effect, and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed. *Sec. 58, act of March 2, 1917 (39 Stat. 968).*

That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws: *Provided, however,* That hereafter all taxes collected under the internal-revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed in the island shall be covered into the treasury of Porto Rico. *Sec. 9, act of Mar. 2, 1917 (39 Stat. 954).*

2993. Laws in effect in Alaska.—That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: * * * *Sec. 3, act of Aug. 24, 1912 (37 Stat. 512).*

Notes of Decisions.

Constitution and laws applicable.—Constitution and laws applicable to Alaska. *Rasmussen v. U. S.* (1905), 25 Sup. Ct. 514, 518, 197 U. S. 516, 49 L. Ed. 862; *Nagle v. U. S.* (1911), 191 Fed. 141, 111 C. C. A. 621.

The common law by act of Congress has been declared to be in force in the Territory of Alaska. *McCloskey v. Pacific Coast Co.* (1908), 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673.

Powers of Congress.—In legislating for Alaska, Congress exercises the combined powers of the General and State Government. The Alaska Code is to be considered and construed as if enacted by the legislature of a State. *Allen v. Myers* (1901), 1 Alaska, 114.

2994. Laws in effect in the Philippine Islands.—That the provisions of this Act and the name "The Philippines" as used in this Act shall apply to and include the Philippine Islands ceded to the United States Government by the treaty of

peace concluded between the United States and Spain on the eleventh day of April, eighteen hundred and ninety-nine, the boundaries of which are set forth in Article III of said treaty, together with those islands embraced in the treaty between Spain and the United States concluded at Washington on the seventh day of November, nineteen hundred. *Sec. 1, act of Aug. 29, 1916 (39 Stat. 545).*

That the statutory laws of the United States hereafter enacted shall not apply to the Philippine Islands except when they specifically so provide, or it is so provided in this Act. *Sec. 5, act of Aug. 29, 1916 (39 Stat. 547).*

That the laws now in force in the Philippines shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States. *Sec. 6, act of Aug. 29, 1916 (39 Stat. 547).*

That all laws or parts of laws applicable to the Philippines not in conflict with any of the provisions of this Act are hereby continued in force and effect. *Sec. 31, act of Aug. 29, 1916 (39 Stat. 556).*

2994½. Laws in effect in Canal Zone.—That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing courts established in the Canal Zone by Executive order are recognized and confirmed to continue in operation until the courts provided for in this Act shall be established. *Sec. 2, act of Aug. 24, 1912 (37 Stat. 561).*

Notes of Decisions.

An order of the President continuing in force for the government of the Canal Zone "the laws of the land, with which the inhabitants are familiar," etc., was construed by the Government as including the Civil Code of Panama, and was followed by an act of Congress ratifying the laws, orders, etc., promulgated by the President. Held, that the order merely embodied the rule

that a change of sovereignty does not end existing private law, and that the act neither fastened upon the Zone a specific civil-law interpretation of the Code nor overthrew the principle of common-law construction adopted and applied by the Supreme Court of the Zone before the act was passed. *Panama Railroad Co. v. Bosse (1918), 249 U. S. 41.*

2995. Laws concerning the military establishment.—All existing laws pertaining to or affecting the United States Military Academy and civilian or military personnel on duty thereat in any capacity whatever, the officers and enlisted men on the retired list, the detached and additional officers under the Act of Congress approved March third, nineteen hundred and eleven, recruiting parties, recruit depots and unassigned recruits, service school detachments, United States disciplinary barracks guards, disciplinary organizations, the Philippine Scouts, and Indian scouts shall continue and remain in force except as herein specifically provided otherwise. *Sec. 22, act of June 3, 1916 (39 Stat. 181).*

For act of Mar. 3, 1911, mentioned above, see 2362, ante.

2996. Revision and codification of military laws.—That the Secretary of War is hereby directed to cause to be prepared, with as much expedition as may be consistent with thoroughness, to be finished within two years, a revision and codification of the military laws of the United States, which shall conform in scope and character to the revision and codification of the laws of the United States of a permanent and general nature directed by the Act of

March third, nineteen hundred and one. The Secretary of War shall submit to Congress a report of progress of the revision and codification herein directed upon the first day of the second session of the Sixty-fourth Congress, and, when the revision and codification is completed, he shall cause a copy of the same, in print, to be submitted to Congress, that the statutes so revised and codified may be reenacted if Congress shall so determine. *Act of Aug. 29, 1916 (39 Stat. 627).*

2997. Compilation of laws concerning river and harbor improvements.—That the laws of the United States relating to the improvement of rivers and harbors, passed between March 4, 1913, until and including the laws of the third session of the Sixty-sixth Congress, shall be compiled under the direction of the Secretary of War and printed as a document, and that six hundred additional copies shall be printed for the use of the War Department. *Sec. 6, act of June 5, 1920 (41 Stat. 1014).*

2997½. Rules for military forces.—The Congress shall have power * * *

To make Rules for the Government and Regulation of the land and naval Forces; * * * *Art. I, sec. 8, Constitution of the United States.*

Notes of Decisions.

Power in general.—The control of the National Government, under this constitutional provision, as well as under the constitutional power "to raise and support armies," ante 2785, is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And after the forces are raised it can define what shall constitute military offenses, and prescribe their punishment. *Tarble's Case (1871), 80 U. S. (13 Wall.), 397, 408.*

The power of Congress to provide for the government of the land and naval forces "in peace and war" is not affected by amendments to the Constitution. In re *Bogart (C. C. 1873), Fed. Cas. No. 1596.*

The president, and subordinate executive officers, whether military or civil, possess a limited power to establish regulations, provided these be in execution of, and supplemental to, the statutes and statute regulations, but not to repeal or contradict existing statutes or statute regulations, nor to make provisions of a legislative nature. Hence the "System of Orders and Instructions" for the Navy, issued by President Fillmore as "Executive of the United States," February 15, 1853, is without legal validity and in derogation of the powers of Congress. (1853) 6 Op. Atty. Gen. 10.

The President has no power, without express authority of law, to fix the relative rank of the line and civil or staff officers

of the Navy, this being an act of the legislative power reposed in Congress by the constitutional provision empowering Congress "to provide and maintain a Navy" and "to make rules for the government of the land and naval forces." (1802) 10 Op. Atty. Gen. 413.

It may now be considered settled by the practice of the Government that the regulation and government of the Army include, as being properly within their scope, the regulation of the appointment and promotion of officers therein. Hence Congress may impose such restrictions and limitations on the appointing power as it deems proper in regard to promotions or appointments to any and all vacancies in the Army, provided the restrictions and limitations be not incompatible with the exercise of the appointing power. (1873) 14 Op. Atty. Gen. 164.

The provision in the naval appropriation act of Mar. 3, 1909 (35 Stat. 753, 773), that no part of the appropriations therein made for the Marine Corps shall be expended unless officers and enlisted men of that corps shall serve, as theretofore, on board all battleships and armored cruisers, etc., in detachments of not less than 8 per cent of the strength of the enlisted men of the Navy on such vessels, is constitutional. (1909) 27 Op. Atty. Gen. 259.

Power as distinct from power of President.—The power of the President to command the Army and Navy and of Congress "to make rules for the government and regulation of the land and naval forces" are distinct. The President can not by military orders evade the legislative regu-

lations; Congress can not by rules and regulations impair the authority of the President as Commander in Chief. *Swain v. U. S.* (1882), 28 Ct. Cl. 173.

State laws.—The laws and regulations for the efficiency of the Army being vested by the Constitution in the Federal Government, the State can not, either through their legislative or judicial departments, regulate or circumscribe the powers of the United States in reference thereto. *In re Fair* (C. C. 1900), 100 Fed. 149.

Trial and punishment of offenses.—Congress may provide for the trial and punishment of military and naval offenses in the manner practiced by civilized nations. *Dynes v. Hoover* (1857), 20 How. (U. S.) 65; *U. S. ex rel. Wessels v. McDonald* (D. C. 1920), 265 Fed. 754.

The constitutionality of the statutes touching Army and Navy courts-martial is no longer an open question. *Ex parte Reed* (1879), 100 U. S. 13.

By reason of the exception made by the fifth amendment of the Constitution, ante 392, of "cases arising in the land or naval forces," such cases are left subject to the operation of the above constitutional provision. *Kurtz v. Moffitt* (1885), 115 U. S. 487.

This provision is no authority for the contention that a Federal district court is without jurisdiction to try a person charged with a fraud under R. S. 5414, although such person was at the time of the commission of the alleged offense an officer of

the Army, and the alleged offense was committed on a military reservation and with intent to defraud an enlisted man, and such person has since been discharged from the Army without any action having been taken by the military authorities. *Neall v. U. S.* (C. C. A. 1902), 119 Fed. 609.

See also notes to A. W. 15, ch. 52, post.

Review of decisions of military courts.—Courts-martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, can not be controlled or revised by the civil courts. Congress has never conferred upon civil officers or magistrates or private citizens any power over offenders punishable only in a military tribunal. *Kurtz v. Moffitt* (1885), 115 U. S. 487.

The power conferred by this provision, which authorizes the creation of courts-martial, and the judicial power conferred by art. 3, sec. 1, of the Constitution, are independent of each other, and when courts organized under these respective powers are proceeding within the limits of their respective jurisdictions they must be held free from any interference. Hence decisions of military courts-martial, within their jurisdiction, are not reviewable by the courts created pursuant to the authority conferred by said art. 3. *Ex parte Dickey* (D. C. 1913), 204 Fed. 322; *U. S. ex rel. Wessels v. McDonald* (D. C. 1920), 265 Fed. 754, 759.

See also notes to A. W. 3, ch. 52, post.

2998. Army regulations.—That so much of section twenty of the act approved July fifteenth, eighteen hundred and seventy, entitled "An act making appropriations for the support of the Army for the year ending June thirtieth, eighteen hundred and seventy-one, and for other purposes," as requires the system of general regulations for the Army therein authorized to be reported to Congress at its next session, and approved by that body, be, and the same is hereby, repealed; and the President is hereby authorized, under said section, to make and publish regulations for the government of the Army in accordance with existing laws. *Act of Mar. 1, 1875* (18 Stat. 337).

The first volume of Army Regulations, using that term in the sense in which it is now understood, was issued to the Army on May 1, 1813, under the authority conferred by the act of Mar. 3 of that year.

From Mar. 29, 1779, until May 1, 1813, the "Regulations for the Order and Discipline of the Troops of the United States" were in force. They were prepared by Maj. Gen. Baron Steuben, the Inspector General of the Army during the latter part of the War of the Revolution, and consisted in great part of matter which would now be properly termed drill regulations. The work was first printed at Worcester, Mass., in 1778, and was formally approved and adopted by Congress on Mar. 29, 1779. The last edition of the Steuben regulations appeared in 1809, and it continued in use as a drill book after it had ceased to have authority as a volume of Army regulations. In 1808 a small volume was published, apparently with the sanction of the War Department, containing the Articles of War which had been enacted in 1806, to which were added such military laws as were then in force.

Sec. 5 of the act of Mar. 3, 1813 (2 Stat. 819), required the Secretary of War to prepare general regulations which, "when approved by the President of the United

States, shall be respected and obeyed until altered or revoked by the same authority." The volume of regulations issued in pursuance of this authority was entitled "Military laws and rules and regulations for the armies of the United States," and was approved by the President on May 1, 1813. It contained the Articles of War of 1806, together with the statutes relating to the military establishment and a small number of regulations, properly so called. Editions of this work were published in 1814 and 1815, the latter, however, without the authority of the War Department.

The act of Apr. 24, 1816 (3 Stat. 296), provided that the "regulations in force before the reduction of the Army be recognized as far as the same shall be found applicable to the service, subject, however, to such alterations as the Secretary of War may adopt, with the approbation of the President." In accordance with this legislation a volume of regulations was issued in September, 1816, and in January, 1820, a new edition containing the orders of the War Department issued since September, 1816.

Sec. 14 of the act of Mar. 2, 1821 (3 Stat. 616), contained a provision that "the system of regulations prepared by Maj. Gen. Scott shall be, and the same are hereby, approved and adopted for the government of the Army of the United States and of the militia when in the service of the United States." These regulations were approved by President Monroe and published to the Army in July, 1821. On May 7, 1822, sec. 14 of the act of Mar. 2, 1821, was formally repealed, thus withdrawing the legislative sanction which had been conferred by the statute above cited. As to this enactment Attorney General Wirt advised that, "notwithstanding such repeal, the regulations having received the sanction of the President continued in force by the authority of the President in all cases where they did not conflict with positive legislation." (1 Opin. Att. Gen. 549.) The regulations of 1821 were revised under the direction of Gen. Scott and a new edition was issued on Mar. 1, 1825, which continued in force until 1835.

A volume of General Regulations, compiled under the direction of Maj. Gen. Macomb, was printed and prepared for issue on Sept. 1, 1835, but was not formally approved and promulgated until Dec. 31, 1836. A second edition of this work, with some modifications, was issued in 1841, and a third edition, containing alterations and amendments, which have been promulgated in orders or taken from former volumes of regulations, was issued to the Army on May 1, 1847.

On Jan. 1, 1857, a volume of Army Regulations, containing a number of important modifications, together with a general rearrangement of paragraphs and subject matter, was prepared under the direction of Secretary Davis, and published with the approval of the President on Jan. 1, 1857. This volume continued in force until Aug. 10, 1861, when it was replaced by a revised edition; a second edition of this work was issued on June 25, 1863, containing the "changes and laws affecting Army Regulations and Articles of War."

The thirty-seventh section of the act of July 28, 1866 (14 Stat. 337), directed the Secretary of War "to have prepared and to report to Congress at its next session a code of regulations for the government of the Army and of the militia in actual service, which shall embrace all necessary orders and forms of a general character for the performance of all duties incumbent on officers and men in the military service, including rules for the government of courts-martial; the existing regulations to remain in force until Congress shall have acted on said report." No code of regulations having been submitted, Congress provided, in section 20 of the act of July 15, 1870 (16 Stat. 319), that "the Secretary of War shall prepare a system of general regulations for the administration of the affairs of the Army, which, when approved by Congress, shall be in force and obeyed until altered or revoked by the same authority, and said regulations shall be reported to Congress at its next session: *Provided*, That the said regulations shall not be inconsistent with the laws of the United States."

In conformity to this legislation a code of regulations, which had been prepared by a board of officers of which Inspector General Marcy was the president, was submitted to the House of Representatives on Feb. 17, 1873, and was by that body referred to the Committee on Military Affairs and ordered to be printed. No steps looking to their adoption were taken during the remainder of the session, and the Fifty-second Congress adjourned without action. The question was taken up by the Military Committee of the House of Representatives in the Forty-third Congress, and the proposition of adopting a code of Army regulations was carefully considered. The conclusion reached by the committee was that the power to make and amend or alter regulations had best be left to Executive discretion. To that end a recommendation was submitted, which was adopted by Congress and approved by the President on Mar. 1, 1875 (18 Stat. 337). This enactment repealed sec. 20 of the act of July 15, 1870, and authorized the President "to make and publish regulations for the government of the Army in accordance with existing laws."

Sec. 2 of the act of June 23, 1870 (21 Stat. 34), authorized and directed the Secretary of War "to cause all the regulations now in force to be codified and published to the Army," and provided that the expense attending the publication of the work should be defrayed from the appropriation for the contingent expenses of the Army for the current fiscal year. Under the authority thus conferred the Regulations of 1881 were prepared and issued to the Army, the order of promulgation bearing date Feb. 17, 1881. A revision and condensation of this volume was issued by the Secretary of War on Feb. 9, 1889. Later revisions were issued Oct. 31, 1895; May 1, 1901; Sept. 15, 1904; Dec. 31, 1910; and Nov. 15, 1913.

Notes of Decisions.

General application of statute.—Sec. 37 of the act of July 28, 1866 (14 Stat. 337), contained the following requirement: "The Secretary be, and he is hereby, directed to have prepared and to report to Congress, at its next session, a code of regulations for the government of the Army, and of the militia in actual service, which shall embrace all necessary orders and forms of a general character for the performance of all duties incumbent on officers and men in the military service, including rules for the government of courts-martial, the existing regulations to remain in force until Congress shall have acted on said report." No code of regulations was submitted to Congress in conformity to the terms of this statute, and it was subsequently held by the Attorney General of the United States, in an opinion rendered in the case of Contract Surgeon Bayne, 17 Op. Atty. Gen. 461, that the above section, if not repealed by the general repealing clause of the Revised Statutes (sec. 5596), was superseded by the act of Mar. 1, 1875 (18 Stat. 337), (a) which in effect conferred authority to modify existing Army Regulations as well as to create new ones. It was also held by the same officer that the code of regulations prepared in conformity to the authority conferred by sec. 2 of the act of June 23, 1870, (b) which was approved and published to the Army on Feb. 17, 1881, Army Regulations of 1881, superseded the code of Army Regulations of 1863. 17 Op. Atty. Gen., 461. See, also, *U. S. v. Eaton*, 144 U. S. 617, 688; *Caba v. U. S.*, 152 U. S. 212, 219; *Morrison v. U. S.*, 13 Ct. Cls. 1-6; *Smith v. U. S.*, 23 id. 452; *Low v. Harrison*, 72 Me. 104.

The codification of the "Regulations of the Army and General Orders," prepared in conformity to sec. 2 of the act of June 23, 1870 (21 Stat. 34), which was approved and promulgated to the Army on February 17, 1881, Army Regulations of 1881, superseded the body of regulations similarly promulgated in 1863. 17 Op. Atty. Gen. 461.

The Army Regulations derive their force from the power of the President as Commander in Chief and are binding upon all within the sphere of his legal and cons.

tional authority. *Kurts v. Moffatt*, 115 U. S. 487, 503; *U. S. v. Eliason*, 16 Pet. 291; *U. S. v. Freeman*, 3 How. 556. The power of the Executive to establish rules and regulations for the government of the Army is undoubted. The power to establish implies, necessarily, the power to modify or repeal or to create anew. The Secretary of War is the regular, constitutional organ of the President for the administration of the Military Establishment of the Nation, and orders publicly promulgated through him must be received as the act of the Executive and, as such, be binding upon all within the sphere of his legal or constitutional authority. Such regulations can not be questioned or defied because they may be thought unwise or mistaken. *U. S. v. Eliason*, 16 Pet. 291, 302.

The term regulations of an executive department describes rules and regulations relating to subjects on which a department acts, which are made by the head under an act of Congress conferring that power, and thereby giving to such regulations the force of law. A mere order of the President or of a Secretary is not a regulation. *Harvey v. U. S.*, 3 Ct. Cls. 38, 42; 4 Comp. Dec. 225.

A "regulation" affects a class of officers; an "instruction" is a direction to govern the conduct of the particular officer to whom it is addressed. *Landram v. U. S.*, 16 Ct. Cls. 74.

The Army Regulations when sanctioned by the President have the force of law, because it is done by him by the authority of law. *U. S. v. Freeman*, 3 How. 556; *Gratlot v. U. S.*, 4 How. 80; *Ex parte Reed*, 100 U. S. 13; *Smith v. U. S.*, 23 Ct. Cls. 452.

When Congress permits regulations to be formulated and published and carried into effect from year to year, the legislative ratification must be implied. *Maddox v. U. S.*, 20 Ct. Cls. 193, 198.

The authority of the head of an executive department to issue orders, regulations, and instructions, with the approval of the President, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress. *U. S. v. Sy-*

monds, 120 U. S. 46, 49; U. S. v. Bishop, *idem.*, 51.

Regulations can have no retroactive effect. U. S. v. Davis, 132 U. S. 834. Provision of statute exists by which the statute regulations of the Army may, within certain limits, be altered by the Secretary of War. 6 Op. Atty. Gen. 10; 8 *id.* 337.

Regulations prescribed and framed by the Secretary of War and which are intended for the direction and government of the officers of the Army and agents of the department do not bind the Commander in Chief nor the head of the War Department. Burns v. U. S., 12 Wall. 246; Smith v. U. S., 24 Ct. Cls. 209, 215. But see Arthur v. U. S., 16 Ct. Cls. 422, and U. S. v. Barrows, 1 Abb. 351.

Regulations which heads of departments are expressly authorized to make, in which the public is interested, become a part of that body of public records of which the courts take judicial notice. Caha v. U. S., 152 U. S. 211.

The purpose of a regulation is to carry into effect the law; but where rights, duties, and obligations are defined by statute they can not be taken away or abridged by regulations. Laurey v. U. S., 32 Ct. Cls. 259; U. S. v. Garlinger, 169 U. S. 316.

While regulations duly promulgated have the force of law in a limited sense, they can not enlarge or restrict the liability of the officer on his bond. Meads v. U. S., 81 Fed. Rep. 684.

Amendment and waiver of regulations.—Regulations made by the head of a department may be amended or waived in their application to particular cases. 3 Comp. Dec. 305; IV *id.* 40; I *id.* 326.

There must be a specific waiver, however, and in the absence of such specific waiver the regulation as it stands will be applied by the accounting officers in the settlement of accounts. 3 *id.* 304; IV *id.* 49.

2999. Lineal rank and service of officers shown in the Official Army Register.—In every Official Army Register hereafter issued, the lineal rank of all officers of the line of the Army shall be given separately for the different arms of the service; and if the officer be promoted from the ranks, or shall have served in the volunteer army, either as an enlisted man or officer, his service as a private and non-commissioned officer shall be given, and in addition thereto the record of his service as volunteer. *Sec. 2, act of June 18, 1878 (20 Stat. 149).*

For statutory provisions that the brevet and volunteer rank of officers of the Regular Army and the names of retired officers shall appear see ante, 2731 and 2421.

CHAPTER 51.

THE POSTAL SERVICE.

Postage stamps for official use, 3000.

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Report as to cost, 3002.

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Mail of Soldiers' Home, 3004.

Soldiers' letters, 3005.

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Dangerous articles, 3017.

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Opening letters, 3019.

Obstructing the mails, 3020.

Oath of persons in Postal Service, 3021.

3000. Postage stamps for official use.—That the Secretaries, respectively, of the Departments of State, of the Treasury, War, Navy, and of the Interior, and the Attorney-General, are authorized to make requisitions upon the Postmaster-General for the necessary amount of official postage-stamps for the use of their departments, not exceeding the amount stated in the estimates submitted to Congress; and upon presentation of proper vouchers therefor at the Treasury, the amount thereof shall be credited to the appropriation for the service of the Post-Office Department for the same fiscal year. * * * *Sec. 2, act of Mar. 3, 1833 (22 Stat. 563).*

For postage stamps for the department and its bureaus, as required under the Postal Union, to prepay postage on matters addressed to Postal Union countries, \$500. *Act of Mar. 3, 1921 (41 Stat. 1280), making appropriations for legislative, executive and judicial expenses: War Department, contingent expenses.*

3001. Free transmission of official mail.—That it shall be lawful to transmit through the mail, free of postage, any letters, packages, or other matters relating exclusively to the business of the Government of the United States: *Provided*, That every such letter or package to entitle it to pass free shall bear over the words "Official business" an endorsement showing also the name of the Department, and, if from a bureau or office, the names of the Department and bureau or office, as the case may be, whence transmitted. * * * *Sec. 5, act of Mar. 3, 1877 (19 Stat. 335).*

Stamps must be used for mail sent to foreign countries.

Notes of Decisions.

Construction of statute.—Official mail coming from the Philippine Islands through the Postal Service of the United States should comply with the general laws of the United States regulating the mails under

the administration of the Postmaster General. (1902) 24 Op. Atty. Gen. 534.

Sec. 3010, post, so far as it relates to the endorsement to be placed on the penalty envelope, is a substitute for the corre-

sponding provision in this section. Such envelope must be indorsed with a proper designation of the office from which the same is transmitted, and a statement of

the penalty provided by the fifth section of the latter act. (1884) 17 Op. Atty. Gen. 631.

3002. Report as to cost of mail under frank.—Hereafter the Postmaster General shall in his annual report submit a detailed statement of the cost to the postal establishment of the matter mailed under frank by each department and independent establishment of the Government and the revenue which would be derived therefrom if carried at the ordinary rates of postage. *Act of June 5, 1920 (41 Stat. 1037).*

3003. Free registration of official mail.—* * * *Provided further,* That any letter or packet to be registered by either of the Executive Departments, or Bureaus thereof, or by the Agricultural Department, or by the Public Printer, may be registered without the payment of any registry fee; and any part-paid letter or packet addressed to either of said Departments or Bureaus may be delivered free; but where there is good reason to believe the omission to prepay the full postage thereon was intentional, such letter or packet shall be returned to the sender: *Provided further,* That this act shall not extend or apply to pension agents or other officers who receive a fixed allowance as compensation for their services, including expenses of postages. And section thirty-nine hundred and fifteen of the Revised Statutes of the United States, so far as the same relates to stamps and stamped envelopes for official purposes, is hereby repealed. *Sec. 29, act of March 3, 1879 (20 Stat. 362), as amended by sec. 3, act of July 5, 1884 (23 Stat. 158).*

Notes of Decisions.

Free registration of official mail.—The proviso authorizing registering without payment of a registry fee of any official letter or packet, by either of the "executive departments, or bureaus thereof," embraces a department officer who, in the course of public business, is called temporarily to discharge his official duties at some place

away from the seat of Government; but such words do not embrace examiners, special agents, inspectors, etc., of the various departments who are located at points outside of Washington or are travelling throughout the country. (1000) 23 Op. Atty. Gen. 316.

3004. Mail matter of the Soldiers' Home.—That the provisions of the fifth and sixth sections of the Act entitled "An Act establishing post-routes, and for other purposes, approved March third, eighteen hundred and seventy-seven," for the transmission of official mail-matter, be, and they are hereby, extended and made applicable to all official mail-matter of the National Home for Disabled Volunteer Soldiers. *Act of Aug. 18, 1894 (28 Stat. 412), making appropriations for sundry civil expenses.*

For secs. 5, 6, mentioned above, see 3001, ante, and 3008, post.

3005. Soldiers' letters forwarded.—* * * The Postmaster General may, however, provide, by regulation, for transmitting unpaid and duly certified letters of soldiers, sailors, and marines in the service of the United States to their destination, to be paid on delivery. *Sec. 9, act of Mar. 3, 1879 (20 Stat. 358).*

3006. Free transmission of soldiers' letters during the World War.—* * * That letters written and mailed by soldiers, sailors, and marines assigned to duty in a foreign country engaged in the present war may be mailed free of

postage, subject to such rules and regulations as may be prescribed by the Postmaster General. *Sec. 1100, act of Oct. 3, 1917 (40 Stat. 327).*

3007. Penalty envelopes provided by the Post Office Department.—* * * the Postmaster-General shall contract, for a period not exceeding four years, for all envelopes, stamped or otherwise, designed for sale to the public, or for use by the Post-Office Department, the postal service, and other Executive Departments, and all Government bureaus and establishments, and the branches of the service coming under their jurisdiction, and may contract for them to be plain or with such printed matter as may be prescribed by the Department making requisition therefor: *Provided*, That no envelope shall be sold by the Government containing any lithographing or engraving, nor any printing nor advertisement, except a printed request to return the letter to the writer. *Act of June 26, 1906 (34 Stat. 476).*

3008. Procurement of penalty envelopes by the departments.—That for the purpose of carrying this act into effect, it shall be the duty of each of the Executive Departments of the United States to provide for itself and its subordinate offices the necessary envelopes: and in addition to the indorsement designating the department in which they are to be used, the penalty for the unlawful use of these envelopes shall be stated thereon. *Sec. 6, act of Mar. 3, 1877 (19 Stat. 336).*

Notes of Decisions.

Construction of statute.—This section does not extend to the Executive. In the absence of a special provision for stamps for his official mail matter, the appropriation for contingent expenses of the executive office is applicable, and to the extent that it is so applied authority exists for

the issue of stamps to him. This section and 3001, ante, do not forbid the use of stamps by the executive departments. The use of the official envelope is limited to the executive departments, and the bureaus or offices therein, at the seat of Government. (1877) 15 Op. Atty. Gen. 202.

3009. Return penalty envelopes.—* * * *Provided*, That any Department or officer authorized to use the penalty envelopes may inclose them with return address to any person or persons from or through whom official information is desired, the same to be used only to cover such official information, and indorsements relating thereto: * * * *Sec. 29, act of March 3, 1879 (20 Stat. 362), as amended by sec. 3, act of July 5, 1884 (23 Stat. 158).*

Notes of Decisions.

Construction.—Where a Member of Congress has addressed an inquiry about official business to a department or any bureau thereof, the reply may properly be addressed to the person concerned in a penalty envelope and sent unsealed to the Member

(that he may take cognizance of its contents), to be by him forwarded to its destination. But in such case the use of the envelope must be strictly limited to the department or bureau and the applicant. (1880) 16 Op. Atty. Gen. 501.

3010. Use of penalty envelopes by all officers.—The provisions of the fifth and sixth sections of the act entitled "An act establishing post-routes, and for other purposes" approved March third, eighteen hundred and seventy-seven, for the transmission of official mail-matter, be, and they are hereby, extended to all officers of the United States Government, not including members of Congress, the envelopes of such matter in all cases to bear appropriate indorsements containing the proper designation of the office from which or officer from whom the same is transmitted, with a statement of the penalty for their misuse.

* * * *Sec. 29, act of March 3, 1879 (20 Stat. 362), as amended by sec. 3, act of July 5, 1884 (23 Stat. 158).*

See also ante, 3001, 3003.

Secs. 5 and 6 of the act of Mar. 3, 1887, are set forth in 3001 and 3008, ante.

These envelopes are for use in domestic correspondence only, and will not cover the transportation of letters to foreign countries, upon which postage stamps must be used. (See pars. 834-839, Army Regulations, 1913, as to the use of penalty envelopes.)

Notes of Decisions.

Construction.—Where the envelopes are not furnished by the departments, they may be prepared for their own use by the officers contemplated in this section. The statute does not require that the penalty, etc., on such envelopes should be printed rather than written. (1880) 16 Op. Atty. Gen. 455.

This section does not impose on the executive departments at Washington the duty of furnishing such envelopes to the various subordinate officers throughout the United States who are under their supervision,

but whose offices are not offices in those departments, excepting, of course, cases where that duty is required by other statutory provisions than those above mentioned. Id.

It, so far as it relates to the indorsement to be placed on the penalty envelope, is a substitute for the corresponding provision of section 3001, ante. Such envelope must be indorsed with a proper designation of the office from which the same is transmitted, and a statement of the penalty provided by the fifth section of the latter act. (1884) 17 Op. Atty. Gen. 631.

3011. Unlawful use of penalty envelopes and franking privilege.—Whoever shall make use of any official envelope, label, or indorsement authorized by law, to avoid the payment of postage or registry fee on his private letter, packet, package, or other matter in the mail, shall be fined not more than three hundred dollars. *Sec. 227, Criminal Code, act of Mar. 4, 1909 (35 Stat. 1134).*

3012. Nonmailable matter.—Every letter; writing; circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter, or thing, of any kind, in violation of any of the provisions of this Act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier:

* * * *Sec. 1, title XII, act of June 15, 1917 (40 Stat. 230).*

The above is taken from the "espionage act" of June 15, 1917 (40 Stat. 217).

See notes to 2857, ante.

3013. Seditious matter, etc., nonmailable.—Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be nonmailable. *Sec. 2, title XII, act of June 15, 1917 (40 Stat. 230).*

See notes to 2857, 3012, ante.

Notes of Decisions.

Writings held nonmailable.—*Jeffersonian Publishing Co. v. West* (D. C. 1917), 245 Fed. 584; *Masses Publishing Co. v. Patten* (C. C. A. 1917), 246 Fed. 24, reversing (1917), 244 Fed. 535; s. c. (1917), 245 Fed. 102; *U. S. ex rel. Milwaukee, etc.,*

Pub. Co. v. Burleson (D. C. App. 1919), 258 Fed. 282 (newspaper denied second-class mailing privilege for violation of espionage act); affirmed (Sup. Ct. 1921), 65 L. Ed. 390; *Shaffer v. U. S.* (C. C. A. 1919), 255 Fed. 886.

3014. Penalty for forwarding nonmailable matter.—Whoever shall use or attempt to use the mails or Postal Service of the United States for the transmission of any matter declared by this title to be nonmailable, shall be fined not more than \$5,000 or imprisoned not more than five years, or both. Any

person violating any provision of this title may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed. *Sec. 3, title XII, act of June 15, 1917 (40 Stat. 230).*

Notes of Decisions.

Evidence.—Evidence examined and held sufficient to connect defendants with the mailing of printed circulars in pursuance of a conspiracy to obstruct the recruiting and enlistment service. *Schenck v. U. S.* (1919), 249 U. S. 47. Likewise evidence to sustain a conviction under this section. *Shaffer v. U. S. (C. C. A. 1919)*, 255 Fed. 880.

3015. Mail addressed to suspected parties not forwarded.—When the United States is at war, the Postmaster General may, upon evidence satisfactory to him that any person or concern is using the mails in violation of any of the provisions of this Act, instruct the postmaster at any post office at which mail is received addressed to such person or concern to return to the postmaster at the office at which they were originally mailed all letters or other matter so addressed, with the words "Mail to this address undeliverable under Espionage Act" plainly written or stamped upon the outside thereof, and all such letters or other matter so returned to such postmasters shall be by them returned to the senders thereof under such regulations as the Postmaster General may prescribe. *Sec. 4, added to title XII, act of June 15, 1917 (40 Stat. 231), by sec. 2, act of May 16, 1918 (40 Stat. 554).*

This section is no longer operative, being expressly repealed by joint resolution of Mar. 3, 1921, ante 2857. For other portion of said joint resolution see 2835, ante.

Notes of Decisions.

Review by courts.—The Postmaster General is required, under this section, to use judgment and discretion in determining whether or not certain matter is mailable, and his decision must be regarded as conclusive by the courts, unless it appears that it is entirely wrong. *Masses Pub. Co. v. Patten (C. C. A. 1917)*, 246 Fed. 24. But it is doubtful if the Postmaster General can issue a blanket order refusing second-class mailing privileges in the future to a newspaper whose previous publications had been found to violate the espionage act. *U. S. ex rel. Milwaukee, etc., Pub. Co. v. Burleson (D. C. App. 1919)*, 258 Fed. 282; affirmed (Sup. Ct. 1921), 65 L. Ed. 800.

3016. Printed matter in a foreign language nonmailable in time of war.—That ten days after the approval of this Act and until the end of the war, it shall be unlawful for any person, firm, corporation, or association, to print, publish, or circulate, or cause to be printed, published, or circulated in any foreign language, any news item, editorial or other printed matter, respecting the Government of the United States, or of any nation engaged in the present war, its policies, international relations, the state or conduct of the war, or any matter relating thereto: *Provided*, That this section shall not apply to any print, newspaper, or publication where the publisher or distributor thereof, on or before offering the same for mailing, or in any manner distributing it to the public, has filed with the postmaster at the place of publication, in the form of an affidavit, a true and complete translation of the entire article containing such matter proposed to be published in such print, newspaper, or publication, and has caused to be printed, in plain type in the English language, at the head of each such item, editorial, or other matter, on each copy of such print,

newspaper, or publication, the words "True translation filed with the postmaster at _____ on _____ (naming the post office where the translation was filed, and the date of filing thereof) as required by the Act of _____ (here giving the date of this Act).

Any print, newspaper, or publication in any foreign language which does not conform to the provisions of this section is hereby declared to be nonmailable, and it shall be unlawful for any person, firm, corporation, or association, to transport, carry, or otherwise publish or distribute the same, or to transport, carry or otherwise publish or distribute any matter which is made nonmailable by the provisions of the Act relating to espionage, approved June fifteenth, nineteen hundred and seventeen: *Provided further*, That upon evidence satisfactory to him that any print, newspaper, or publication, printed in a foreign language may be printed, published, and distributed free from the foregoing restrictions and conditions without detriment to the United States in the conduct of the present war, the President may cause to be issued to the printers or publishers of such print, newspaper, or publication, a permit to print, publish, and circulate the issue or issues of their print, newspaper, or publication, free from such restrictions and requirements, such permits to be subject to revocation at his discretion. And the Postmaster General shall cause copies of all such permits and revocations of permits to be furnished to the postmaster of the post office serving the place from which the print, newspaper, or publication, granted the permit is to emanate. All matter printed published and distributed under permits shall bear at the head thereof in plain type in the English language, the words, "Published and distributed under permit authorized by the Act of _____ (here giving date of this Act), on file at the post office of _____ (giving name of office)."

Any person who shall make an affidavit containing any false statement in connection with the translation provided for in this section shall be guilty of the crime of perjury and subject to the punishment provided therefor by section one hundred and twenty-five of the Act of March fourth, nineteen hundred and nine, entitled "An Act to codify, revise, and amend the penal laws of the United States," and any person, firm, corporation, or association, violating any other requirement of this section shall, on conviction thereof, be punished by a fine of not more than \$500, or by imprisonment of not more than one year, or, in the discretion of the court, may be both fined and imprisoned. *Sec. 19, act of Oct. 6, 1917 (40 Stat. 425-426).*

For joint resolution that certain statutes, the operation of which is contingent upon the existence of a state of war, shall be construed as if the World War had ended on Mar. 3, 1921, see 2835, ante.

3017. Restrictions on mailing dangerous articles.—That all kinds of poison, and all articles and compositions containing poison, and all poisonous animals, insects, and reptiles, and explosives of all kinds, and inflammable materials, and infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode, and all disease germs or scabs, and all other natural or artificial articles, compositions, or materials, of whatever kind, which may kill or in anywise hurt, harm, or injure another or damage, deface, or otherwise injure the mails or other property, whether sealed as first-class matter or not, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any letter carrier; but the Postmaster General may permit the transmission in the mails, from the manufacturer thereof or dealer therein to

licensed physicians, surgeons, dentists, pharmacists, druggists, and veterinarians, under such rules and regulations as he shall prescribe, of any articles hereinbefore described which are not outwardly or of their own force dangerous or injurious to life, health, or property: *Provided*, That all spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind are hereby declared to be nonmailable, and shall not be deposited in or carried through the mails. Whoever shall knowingly deposit or cause to be deposited for mailing or delivery, or shall knowingly cause to be delivered by mail, according to the direction thereon or at any place at which it is directed to be delivered by the person to whom it is addressed, anything declared by this section to be nonmailable, unless in accordance with the rules and regulations hereby authorized to be prescribed by the Postmaster General, shall be fined not more than \$1,000 or imprisoned not more than two years, or both; and whoever shall knowingly deposit or cause to be deposited for mailing or delivery, or shall knowingly cause to be delivered by mail, according to the direction thereon or at any place to which it is directed to be delivered by the person to whom it is addressed, anything declared by this section to be nonmailable, whether transmitted in accordance with the rules and regulations authorized to be prescribed by the Postmaster General or not, with the design, intent, or purpose to kill or in anywise hurt, harm, or injure another, or damage, deface, or otherwise injure the mails or other property, shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both. *Sec. 217, Criminal Code, act of March 4, 1909 (35 Stat. 1131), as amended by act of May 25, 1920 (41 Stat. 620-621).*

3018. Censorship of communications during the World War.—Whenever, during the present war, the President shall deem that the public safety demands it, he may cause to be censored under such rules and regulations as he may from time to time establish, communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country he may from time to time specify, or which may be carried by any vessel or other means of transportation touching at any port, place, or territory of the United States and bound to or from any foreign country. Any person who willfully evades or attempts to evade the submission of any such communication to such censorship or willfully uses or attempts to use any code or other device for the purpose of concealing from such censorship the intended meaning of such communication shall be punished as provided in section sixteen of this Act. *Sec. 3(d), act of Oct. 6, 1917 (40 Stat. 418).*

For joint resolution that certain statutes, the operation of which is contingent upon the existence of a state of war, shall be construed as if the World War had ended on Mar. 3, 1921, see 2835, ante.

3019. Opening letters.—* * * *Provided*, That nothing in this Act shall be so construed as to authorize any person other than an employee of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself. *Sec. 1, title XII, act of June 15, 1917 (40 Stat. 230).*

3020. Obstructing the mails.—Whoever shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier, or car, steamboat, or other conveyance or vessel carrying the same, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both. *Sec. 201, Criminal Code, act of March 4, 1909 (35 Stat. 1127).*

Notes of Decisions.

Use of Army in emergency.—The entire strength of the Nation may be used to enforce, in any part of the land, the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the trans-

portation of the mails. If the emergency arise, the Army of the Nation and all its militia are at the service of the Nation to compel obedience to its laws. In *re Debs*, 158 U. S. 564, 582; In *re Neagle*, 135 U. S. 1; *Ex parte Siebold*, 100 U. S. 371, 395; *U. S. v. Kirby*, 7 Wall 482. See *Winthrop, Military Law and Precedents*, p. 1355, note 3.

3021. Oath of persons in the postal service.—That before entering upon the duties, and before they shall receive any salary, the Postmaster General, and all persons employed in the postal service, shall respectively take and subscribe before some magistrate or other competent officer authorized to administer oaths by the laws of the United States, or of any State or Territory, the following oath or affirmation:

"I, A. B. do solemnly swear (or affirm, as the case may be,) that I will faithfully perform all the duties required of me and abstain from everything forbidden by the laws in relation to the establishment of post-offices and post-roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control; and I also further swear (or affirm) that I will support the Constitution of the United States; so help me God." And this oath or affirmation may be taken before any officer civil or military holding a commission under the United States, and such officer is hereby authorized to administer and certify such oath or affirmation. *Sec. 15, act of June 8, 1872 (17 Stat. 287), as amended by act of March 5, 1874 (18 Stat. 19-20).*

Secs. 391 and 392, R. S., incorporated the act of June 8, 1872, but not the amendatory act of Mar. 5, 1874.

The oath prescribed by R. S. 1757, ante, 91, is to be taken by any person elected or appointed to any office of honor or profit, in the civil, military, or naval service, except the President, by sec. 2, act of May 13, 1884, ante, 91.

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Oath of postmasters.—A mail contractor can not draw pay for services or work rendered or done prior to his taking the oath prescribed by act of Mar. 3, 1863, in part reenacted herein. (1866) 11 Op. Atty. Gen. 498.

While postmasters, in common with all other officers of the United States, except the President, are now required to take the oath of office prescribed in R. S. 1757, ante, 91, they are not exempted from taking the oath prescribed by this act, but must take this also. (1885) 18 Op. Atty. Gen. 182.

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- 84. Waste or unlawful disposition of military property issued to soldiers.

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- 116. Powers of assistant trial judge advocate and of assistant defense counsel.
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Historical Note.

1. **BRITISH CODE.**—In the early periods of English history military law existed only in time of actual war. When war broke out troops were raised as occasion required, and ordinances for their government, or, as they were afterwards called, articles of war, were issued by the Crown, with the advice of the constable or of the peers or other experienced persons, or were enacted by the commander in chief in pursuance of an authority for that purpose given in his commission from the Crown. Grose, *Antiquities*, vol. 2, p. 58.

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These ordinances or articles, however, remained in force only during the service of the troops for whose government they were issued, and ceased to operate on the conclusion of peace. Military law in time of peace did not come into existence until the passing of the first mutiny act in 1689.

The system of governing troops in active service by articles of war, issued under the prerogative power of the Crown, whether issued by the King himself or by the commanders in chief, or by other officers holding commissions from the Crown, continued from the time of the conquest till long after the passing of the annual mutiny acts (*Barwis v. Keppel*, 2 Wilson's Rep. 314), and did not actually cease till the prerogative power of issuing such articles was superseded in 1803 by a corresponding statutory power, 43 Geo. III, ch. 20.

The earlier articles were of excessive severity, inflicting death or loss of limb for almost every crime. Gradually, however, they assumed something of the shape which they bear in modern times, and the ordinances or articles of war issued by Charles II in 1672 formed the groundwork of the articles of war of 1778, which were consolidated with the mutiny act in the army discipline and regulation act of 1879, which was replaced by the army act of 1881. The army code of 1881, which now constitutes the military code of the British Army, has of itself no force, but requires to be brought into operation annually by another act of Parliament, thus securing the constitutional principle of the control of the Parliament over the discipline requisite for the government of the army. *Manual of Military Law*, War Office, 1914, pp. 6-14.

2. **AMERICAN CODES.**—(a) *Code of 1775.*—Passing over the earlier enactments of the American colonies of articles of war for the government of their respective contingents, of which we have examples in the articles adopted by the Provisional Congress of Massachusetts Bay, Apr. 5, 1775 (*American Archives*, 4th series, vol. 1, p. 1350), followed by similar articles adopted in May and June of the same year, successively, by the Provincial Assemblies of Connecticut and Rhode Island and the Congress of New Hampshire (*Idem*, vol. 2, pp. 565, 1153, 1180), we come to the first American articles—Code of 1775—enacted by the Second Continental Congress, June 30, 1775. Of this code, comprising 69 articles, the original was the existing British Code of 1774, from which said articles were largely copied. The code was amended by the Continental Congress of November 7, 1775, by adding thereto 16 provisions, intended to complete the original draft in certain particulars in which it was imperfect.

(b) *Code of 1776.*—The Articles of 1775 were superseded the following year by what has since been known as the Code of 1776, enacted Sept. 20 of that year. It was an enlargement, with modifications, of the amended Code of 1775. There followed the amendments of 1788, regulating the composition of courts-martial, and generally the administration of military justice. As thus amended the code survived the adoption of the Constitution of the United States, being continued in force by successive statutes, "so far as the same are applicable to the Constitution of the United States." The necessity, however, for revision, in order to adapt the articles to the changed form of government, became obvious. This revision was accomplished by the act of Apr. 10, 1806 (2 Stat., 359), which superseded all other enactments on the same subject, and is generally designated as the Code of 1806.

(c) *Code of 1806.*—The Code of 1806 (adopted by act of Apr. 10, 1806, 2 Stat. 359) was, in effect, a reenactment of the articles in force during and immediately following the period of the Revolutionary War, with only such modifications as were necessary to adapt them to the Constitution of the United States. It comprised 101 articles, with an additional provision relating to spies. During the War of 1812 four articles were amended, during the Seminole wars three articles were amended and one article added, and during the Civil War seventeen articles were amended and eight articles added.

(d) *Code of 1874.*—There was no formal revision of the Articles of War in the revision of the Statutes of 1874, although there was such a restatement of them as was possible under the limited authority which was given the compilers of that revision. The Code, as it appeared in the Revision of 1874, embraced 128 articles, with the additional article as to spies, and these, with the amendments enacted since 1874, may be said to have been the military code of the United States for 110 years (i. e., down to the Code of 1916).

(e) *Code of 1916.*—The Code of 1916 was enacted Aug. 29, 1916 (39 Stat. 619), and, with the exception of certain articles taking immediate effect, became operative Mar. 1, 1917. This Code was a complete revision which eliminated obsolete matter and introduced many modifications and changes looking to a scientific and modern statement of military law. As modified by subsequent legislation, it remained the law until the enactment of the Code of 1920. A list of the amendments to this Code is given below.

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(f) *Code of 1920*.—The Code of 1920 was enacted June 4, 1920 (41 Stat., 787), as Chap. II of the act of that date, amending the National Defense Act of June 3, 1916, effective Feb. 4, 1921, except that arts. 2, 23, and 45 took effect immediately (3023, post). A table of corresponding article numbers in the Code of 1874 and the Codes of 1916 and 1920 is given below. As the section numbers of the Code of 1916 were retained in the Code of 1920, except in art. 29, only one table is necessary. A short comparative statement of the Code of 1916 and the Code of 1920 is given below.

A. CODE OF 1874 AND CODES OF 1916 AND 1920.

1874	1916 and 1920	1874	1916 and 1920	1874	1916 and 1920	1874	1916 and 1920
1		32	61	63	2	96	43
2	109, 110	33	61	64	2	97	42
3	55	24	61	65	69	98	41
4	106	35	61	66	69	99	118
5	56	36		67	71	100	44
6	56	37		68	72	101	
7	57	38	41, 85	69	73	102	40
8	57	39	86	70	70	103	39
9	79	40	61	71	70	104	46
10		41	75	72	8	105	48
11		42	75	73	8	106	48
12	56	43	76	74	11	107	48
13	56	41	77	75	5	108	49
14	56	45	81	76		109	46
15	83	46	84	77	4	111	51
16	84	47	88	78	4	112	50
17	84	48	107	79	18	113	25
18	87	49	28	81	6, 9, 13	114	111
19	62	50	29, 96	82	6, 9, 13	115	97
20	63	51	59	83	12, 14	116	98
21	64	52		84	19	117	100
22	66	53		85	19	118	101
23	67	51	89, 106	86	32	119	102
24	68	55	89, 106	87		120	103
25	90	56	88	88	18	121	27
26	91	57	78	89	21	122	120
27	91	58	92, 93	90	17	124	119
28	91	59	74	91	26	125	112
29	121	60	2, 94	92	19	126	112
30	121	61	85	93	20, 70	127	112
31	61	62	93, 96	96	31	128	119

¹ Articles 72, 73, 75, 81, 82, and 83, Code of 1874, were replaced by act of Mar. 2, 1913 (37 Stat. 728), effective July 1, 1913.

The following articles of the Code of 1874 not given in the above table had been repealed prior to the enactment of the Code of 1916 (the matter in such articles not appearing in later codes): Arts. 80 and 110, by sec. 2, act of June 13, 1898 (30 Stat. 484); art. 94, by sec. 2, act of Mar. 2, 1901 (31 Stat. 951); and art. 123, by sec. 2, act of Mar. 8, 1910 (36 Stat. 235).

B. AMENDMENTS TO THE CODE OF 1916.

Art. 50 was amended by act of Feb. 28, 1919 (40 Stat. 1211).

Arts. 52, 53, and 57 were amended by act of July 9, 1918 (40 Stat. 882).

Art. 112 was amended by acts of July 9, 1918 (40 Stat. 882), and Nov. 19, 1919 (41 Stat. 356).

C. CODE OF 1916 AND CODE OF 1920.

(a) Article numbers correspond except as indicated in (b).

(b) Art. 29, Code of 1916, is in new art. 23; arts. 29 and 50¹, Code of 1920, are new.

(c) The following articles contain new matter of substance not in Articles of 1916 or omit similar matter which was therein:

2	21	38	57	94
4	23	40-43	68-70	104
5	24	45-50	75	112
6	27	50 ¹	76	118
8	28-33	52	81	119
11-19	36	56	93	

(d) Articles not appearing in the above list are either identical with the corresponding articles in the Code of 1916 or merely differ in details not affecting the substance (e. g., the word "trial" has been inserted in several articles before the words "judge advocate" for the sake of clarity).

3022. Title and operation.—The articles included in this section shall be known as the Articles of War and shall at all times and in all places govern the armies of the United States. * * * *Sec. 1, chap. II, act of June 4, 1920 (41 Stat. 787).*

3023. When in effect.—That the provisions of Chapter II of this Act shall take effect and be in force eight months after the approval of this Act: *Provided*, That articles 2, 23, and 45 shall take effect immediately. *Sec. 2, chap. II, act of June 4, 1920 (41 Stat. 812).*

3024. Offenses committed prior to the enactment of the present code.—That all offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the taking effect of Chapter II of this Act, under any law embraced in or modified, changed, or repealed by Chapter II of this Act, may be prosecuted, punished, and enforced in the same manner and with the same effect as if this Act had not been passed. *Sec. 3, chap. II, act of June 4, 1920 (41 Stat. 812).*

3025. Repeal of R. S. 1342.—That section 1342 of the Revised Statutes of the United States be, and the same is hereby, repealed, and all laws and parts of laws in so far as they are inconsistent with this Act are hereby repealed. *Sec. 4, chap. II, act of June 4, 1920 (41 Stat. 812).*

This is the section of the Revised Statutes containing the former Articles of War.

I. PRELIMINARY PROVISIONS.

Article 1. Definitions.—The following words when used in these articles shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

- (a) The word "officer" shall be construed to refer to a commissioned officer;
- (b) The word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man;
- (c) The word "company" shall be understood as including a troop or battery; and
- (d) The word "battalion" shall be understood as including a squadron.

Same as in Code of 1916.

Art. 2. Persons subject to military law.—The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles: *Provided*, That nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same;

(b) Cadets;

(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

(e) All persons under sentence adjudged by courts-martial;

(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

This article became effective on June 4, 1920.

The following portion of subdivision (a) is new: "members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps."

Inmates of the Soldiers' Home (R. S. 4824, ante 1950), the National Home for Disabled Volunteer Soldiers (R. S. 4835, ante 1960), all persons admitted to treatment in the General Hospital at Fort Bayard, Mexico, while patients in said hospital (act of June 12, 1906, ante, 2009), all persons admitted to treatment in the Army and Navy General Hospital at Hot Springs, Arkansas, while patients in said hospital (act of Mar. 3, 1909, ante 2007), and officers and enlisted men of the Medical Department of the Navy while serving with a body of marines detached for service with the Army (act of Aug. 29, 1916, ante 480), are by the statutes cited made subject to the rules and articles for the government of the armies of the United States.

Notes of Decisions.

Nature of service.—Service in the army or navy of one's country, according to the terms of the enlistment, never implies slavery or involuntary servitude, even where the soldier or sailor is required against his will to respect the terms upon which he voluntarily engaged to serve the public. *Robertson v. Baldwin*, 165 U. S. 275, 290.

Military law is due process of law to those in the military or naval service of the United States. *Reaves v. Ainsworth* (1911) 219 U. S. 296, affirming (1906) 28 App. D. C. 157.

Implied repeal.—This article was not repealed by implication by sec. 6, selective service act of May 18, 1917 (40 Stat. 76). *Franke v. Murray* (C. C. A. 1918), 248 Fed. 865.

Draft.—One certified into the military service under the selective service act of May 18, 1917, is, from the date of the draft, subject to military law. *Franke v. Murray* (C. C. A. 1918), 248 Fed. 865; *Ex parte Thieret* (C. C. A. 1920), 268 Fed. 472. See also notes to 2239, ante.

Retainers; "in the field."—The following cases, arising in time of war, construing subdivision (d) of this article, held

the relator subject to the article. *Ex parte Gerlach* (D. C. 1917), 247 Fed. 616, a mate of an Army transport; *Ex parte Falls* (D. C. 1918), 251 Fed. 415, a civilian cook on an Army transport; *Ex parte Jochen* (D. C. 1919), 257 Fed. 200, a superintendent, Quartermaster Corps, serving on the Mexican border; and *Hines v. Mikell* (C. C. A. 1919), 259 Fed. 28, reversing *Ex parte Mikell* (D. C. 1918), 253 Fed. 817, a civilian stenographer and auditor employed in the construction quartermaster's office at a cantonment in the United States. In *Ex parte Weltz* (D. C. 1919), 256 Fed. 58, the civilian driver of an automobile of a contractor doing construction work at a camp in the United States was held not within this article.

The words "in the field" imply military operations with a view to an enemy. When an army is engaged in offensive or defensive operations, it is safe to say that it is an army "in the field." To decide exactly the boundary line between civil and military jurisdiction as to civilians attached to an army is difficult; but it is evident that they are within military jurisdiction when their treachery, defection, or insubordination might endanger or embarrass the army

to which they belong in its operations against what is known in military phrase as "an enemy." (1872) 14 Op. Atty. Gen. 22.

Improper induction.—One claiming that his induction into the Army was illegal (but not void) was bound, while in the Army, to obey orders and observe discipline and is liable to trial by court-martial for failure to do so. *Ex parte Tinkoff* (D. C. 1919), 254 Fed. 912.

Effect of separation from the service.—A court-martial may adjudge a sentence extending beyond the time of service for which the accused had enlisted. In *re Stubbs* (C. C. 1905), 183 Fed. 1012; *Ex parte Mason* (1881), 105 U. S. 696.

The fact that an Army officer sentenced by a court-martial to fine and imprisonment is by the same judgment dismissed from the service does not deprive the military authorities of jurisdiction to carry out the sentence. *Carter v. McClaughry* (1902), 183 U. S. 365, 383; *Kahn v. Anderson* (1921), 254 U. S. —; 65 L. Ed. 288; *Rose v. Roberts* (C. C. A. 1900), 99 Fed. 848.

The authorities on the general question whether a member of the military or naval forces continues subject to the jurisdiction

of a court-martial for offenses committed while in the service, where prosecution is not instituted until after he has left the service, reviewed. (1919) 31 Op. Atty. Gen. 521.

An inactive member of the Naval Reserve is not subject to trial by court-martial after release from active service. *U. S. v. McDonald* (D. C. 1920), 265 Fed. 695.

Nor can he be recalled into service in order merely to be given a court-martial. *U. S. v. Warden of Naval Prison* (D. C. 1919), 265 Fed. 787.

See last paragraph of art. 94, post.

Estoppel.—Enlistment in National Guard, taking the Federal oath as prescribed by the national defense act of June 3, 1916, receipt of pay and clothing over long period from both the State and United States held to constitute one a soldier, subject to jurisdiction of military tribunals, although he was under 21 when enlisted, enlisted without consent of parent or guardian, was an alien who had not made declaration of intention, and had mother dependent on him for support. *Ex parte Dostal* (D. C. 1917), 243 Fed. 664.

Marine Corps serving with Army.—See notes to 481, ante.

II. COURTS-MARTIAL.

Art. 3. Courts-martial classified.—Courts-martial shall be of three kinds, namely:

- First, general courts-martial;
- Second, special courts-martial; and
- Third, summary courts-martial.

Same as in Code of 1916.

A similar organization is prescribed for the National Guard not in the service of the United States. See sec. 102, act of June 3, 1916, ante, 2558.

Notes of Decisions.

See, also, notes to art. 5, post.

Historical.—The law governing courts-martial is found in the statutory enactments of Congress, particularly in the articles of war, in regulations prescribed by Executive authority, and in military usage and procedure. In *re Brodie* (1904), 128 Fed. 665, 63 C. C. A. 419.

Constitutionality of acts relating to courts-martial.—The acts of Congress touching Army courts-martial established in the United States are constitutional. *U. S. v. Praeger* (D. C. 1907), 149 Fed. 474.

The power of Congress under art. 1, sec. 8 of the Constitution, to provide for the punishment of military and naval offenses, is independent of the judicial power defined in art. 3 of the Constitution. *U. S. v. McDonald* (D. C. 1920), 265 Fed. 754.

Nature and attributes of courts-martial in general.—Courts-martial are lawful tribunals existing under the Constitution and acts of Congress, having plenary jurisdiction of offenses committed to them by the law military, and they are supreme while acting within the sphere of their exclusive jurisdiction. *Carter v. Roberts* (1900), 20 Sup. Ct. 713, 177 U. S. 496, 44 L. Ed. 861; *Rose v. Roberts* (1900), 99 Fed. 948, 949, 40 C. C. A. 199; In *re Bogart* (C. C. 1873), Fed. Cas. No. 1,596.

Courts-martial are lawful tribunals existing by the same authority as civil courts of the United States, have the same plenary jurisdiction in offenses by the law military as the latter courts have in controversies within their cognizance, and in their special and more limited sphere are entitled to as

untrammelled an exercise of their powers. In re Davison (C. C. 1884), 21 Fed. 618.

Procedure.—In the absence of a regulatory statute, the proceedings of courts-martial are governed by the usages and customs of the military service, and not by common-law rules applicable to civil tribunals. *Kirkman v. McClaughry* (1908), 160 Fed. 436, 90 C. C. A. 80, affirming order (C. C. 1907), 152 Fed. 255.

Rules of evidence in general.—In general, courts-martial are governed by the same rules of evidence which govern the ordinary courts of criminal jurisdiction. These rules, where not provided by statute, are supplied by the common law. (1882) 17 Op. Atty. Gen. 310.

Opinions as to admissibility of evidence.—It is not the official duty of the Secretary of War to give to the judge advocate, and thus to the court-martial, an opinion as to the admissibility of certain evidence in the trial of a case before the court, nor as to the construction of a statute. Such questions should be left to the decision of the court-martial itself. (1881) 17 Op. Atty. Gen. 54.

Jurisdiction of military commissions.—See *Ex parte Milligan* (1866), 4 Wall. 2, 130, 18 L. Ed. 281; *Coleman v. Tennessee* (1878), 97 U. S. 509, 512, 24 L. Ed. 1118.

Officers competent to sit on courts-martial.—Retired officers of the Army are officers in the military service of the United States within the meaning of the Fourth Article of War, post, and an order assigning such officers to a court-martial was within the authority conferred upon the Secretary of War by 2431, ante, to assign retired officers of the Army, with their consent, to active duty on courts-martial. *Kahn v. Anderson* (1921), 254 U. S. —; 65 L. Ed. 288; *U. S. v. Tyler* (1881), 105 U. S. 244.

Officers of the United States Guards, a force organized by the President under the power conferred on him by sec. 2. of the selective service act, ante 2163, were, since by the express terms of sec. 1 of said act, a part of the Army, of the United States, competent to be assigned to court-martial duty. *Kahn v. Anderson* (1921), 254 U. S. —; 65 L. Ed. 288. (Query, was not reference to sec. 1 of the national defense act of June 3, 1916, intended?)

On habeas corpus, evidence is inadmissible to show that retired officers who composed the court-martial in time of war were employed on active duty in the discretion of the President, when that fact is not shown by the record. *Ex parte Henkes* (D. C. 1919), 267 Fed. 276; reversed (C. C. A. 1921) — Fed. —; but compare *Givens v. Zerbst* (1921), 254 U. S. —; 65 L. Ed. 284.

The graduated cadets of the Military Academy, assigned to service as supernumerary officers, are brevet second lieutenants, and as such commissioned officers, and therefore subject to all the duties and entitled to exercise all the powers of that grade, including the legal capacity to sit on courts-martial as commissioned officers. But the undergraduate cadets are not commissioned officers, and therefore are not competent to sit on a court-martial. (1821) 1 Op. Atty. Gen. 469; (1829) 2 Op. Atty. Gen. 251; (1829) 7 Op. Atty. Gen. 323.

Volunteer naval officers appointed under act of July 24, 1861, held "commissioned officers," and competent to serve on general courts-martial. (1863) 10 Op. Atty. Gen. 522.

See, also, notes under art. 5, post.

Showing of validity, etc., of proceedings.—Evidence that the accused, at the time of his trial and conviction for a homicide before a general court-martial, had a military status, is admissible on habeas corpus where, except for the form of charge, the court-martial record failed to establish that the accused belonged to the Army, but did establish on its face the power to convene the court-martial, so that the authority of that court to decide the particular subject before it was undoubted. *Givens v. Zerbst* (1921), 254 U. S. —; 65 L. Ed. 284; *In re Bergdoll* (D. C. 1921), — Fed. —.

Courts-martial being courts of inferior and limited jurisdiction, it must be made to clearly and affirmatively appear, in order to give effect to their judgments, that the court was legally constituted, that it had jurisdiction of the person and offense charged, and that its judgment imposed was conformable to law. *Hamilton v. McClaughry* (C. C. 1906), 186 Fed. 445; *Brooks v. Adams* (1831), 28 Mass. 441; *Mills v. Martin* (N. Y. 1821), 19 Johns. 7; *Duffield v. Smith* (Pa. 1818), 3 Serg. & R. 590.

Proof that a court-martial was convened by an officer empowered by the statute to call it, that the officers whom he commanded to sit upon it were of those whom he was authorized to detail for that purpose, that the court thus constituted was vested with power to try the person and the offense charged, and that its sentence was in conformity to the statute, was indispensable to its jurisdiction and to the validity of its judgment. *Deming v. McClaughry* (1902), 113 Fed. 639, 51 C. C. A. 349; order affirmed, *McClaughry v. Deming* (1902), 22 Sup. Ct. 766, 186 U. S. 49, 48 L. Ed. 1049.

But it is not necessary, on the trial before a general court-martial, to negative every possible condition the existence of which might have prevented the court from

trying the case, including the possibility that the officer under trial might have belonged to a command which did not come within the power to call a court-martial conferred upon the convening officer. *Givens v. Zerbst* (1921), 254 U. S. —; 65 L. Ed. 284. Compare *Ex parte Henkes* (D. C. 1919), 267 Fed. 276; reversed (C. C. A. 1921), — Fed. —.

Estoppel to deny legality of court-martial.—Though an officer, suspended from rank and duty for twelve years, with a forfeiture of half his pay, waited six years before bringing an action, it can not be held that he acquiesced in the sentence, or that he is concluded from contesting its legality by accepting the half pay without rendering service. *Swalm v. U. S.* (1898), 28 Ct. Cl. 178.

Waiver of objections to jurisdiction of court-martial.—Since a United States court-martial, constituted to try delinquent militiamen, sit as judges, a party arrested waives all objections to the jurisdiction of the court by pleading guilty. *Vanderheyden v. Young* (N. Y. 1814), 11 Johns. 150. But see (1898) 22 Op. Atty. Gen. 137, holding that the consent of the accused can not confer jurisdiction upon a court not possessing it by virtue of statutory authority.

Review of decisions.—Where a court-martial has jurisdiction of the person accused and of the offense charged, and acts within the scope of its lawful powers, its decisions and sentences can not be reviewed or set aside by the civil courts. *Mullan v. U. S.* (1909), 212 U. S. 518; *U. S. v. Grimley* (1890), 11 Sup. Ct. 54, 137 U. S. 147, 34 L. Ed. 638, reversing judgment in *re Grimley* (C. C. 1889), 38 Fed. 84; *Swalm v. U. S.* (1897), 17 Sup. Ct. 448, 451, 165 U. S. 553, 41 L. Ed. 823; *In re Zimmerman* (C. C. 1887), 30 Fed. 178, 177; *In re McVey* (D. C. 1885), 23 Fed. 878; *U. S. v. Praeger* (D. C. 1907), 140 Fed. 474; *Ex parte Tucker* (D. C. 1913), 212 Fed. 569; *U. S. v. McDonald* (D. C. 1920), 205 Fed. 754; *In re Felnier* (Sup. Ct., D. C., 1921), 49 Wash. L. R. 147.

The only authority of the civil courts is to inquire whether the military authorities are proceeding regularly within their jurisdiction. If they are, they can not be interfered with, no matter what errors may be committed in the exercise of their lawful jurisdiction. *U. S. v. Grimley* (1890), 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 638, reversing judgment in *re Grimley* (C. C. 1889), 38 Fed. 84; *U. S. v. Williford* (C. C. A. 1915), 220 Fed. 291; *Ex parte Dostal* (D. C. 1917), 243 Fed. 664; *Swalm v. U. S.* (1897), 17 Sup. Ct. 448, 451, 165 U. S. 553, 41 L. Ed. 823; *Carter v. Roberts* (1900), 20 Sup. Ct. 713, 177 U. S. 496,

44 L. Ed. 861; *Grafton v. U. S.* (1907), 27 Sup. Ct. 749, 750, 206 U. S. 333, 51 L. Ed. 1084, 11 Ann. Cas. 640; *Ex parte Mason* (1881), 105 U. S. 696, 699, 26 L. Ed. 1213; *In re McVey* (D. C. 1885), 23 Fed. 878; *Ex parte Tucker* (D. C. 1913), 212 Fed. 569; *In re Esmond* (D. C. 1886), 5 Mackey, 64. And this is so even though the civil court, if it had first taken hold of the case, might have tried the accused for the same offense, or even for one of higher grade arising out of the same facts. *Grafton v. U. S.* (1907), 27 Sup. Ct. 749, 750, 206 U. S. 333, 51 L. Ed. 1084, 11 Ann. Cas. 640.

Civil courts have no jurisdiction to interfere with the military tribunals, while proceeding regularly in the exercise of their jurisdiction to try parties accused of desertion from the Army. *In re White* (C. C. 1883), 17 Fed. 723.

The jurisdiction of a general court-martial may always be inquired into by the civil courts, upon the application of any party aggrieved by its judgment; and if such a court exceeds its authority, and undertakes to try and punish a person not within its jurisdiction, its judgment is void, and may be so declared by any court having jurisdiction of the proper parties and of the subject-matter. *Barrett v. Hopkins* (C. C. 1881), 7 Fed. 312; *Dynes v. Hoover* (1857), 20 How. 85, 82, 15 L. Ed. 838.

The acts of a court-martial, within the scope of its jurisdiction and duty, can not be controlled or reviewed in the civil courts by writ of prohibition or otherwise. *Smith v. Whitney* (1886), 116 U. S. 187, 177, 6 Sup. Ct. 570, 29 L. Ed. 601.

If a court-martial has jurisdiction to hear and determine, and to render the particular judgment or sentence imposed, however erroneous the proceedings may be, they can not be reviewed collaterally upon habeas corpus. *In re Davison* (C. C. 1884), 21 Fed. 618.

The only questions which can be inquired into are as to the jurisdiction of the court over the person of the accused and the offense charged, and whether it acted within the scope of its lawful powers. *Rose v. Roberts* (C. C. A. 1900), 99 Fed. 948; *In re Crain* (C. C. 1897), 84 Fed. 788.

If a court-martial originally had jurisdiction, it must be shown, to warrant interference, that at some point it lost it. *U. S. v. Hunt* (D. C. 1918), 254 Fed. 305.

The severity of a sentence, or alleged errors of law committed by the court-martial, can not be reviewed. *Ex parte Dickey* (D. C. 1913), 204 Fed. 322.

Where, on return to a writ of habeas corpus, the respondent alleged that he held the petitioner under a judgment of convic-

tion by a military court-martial, the burden is on the respondent to show that the judgment was based on some provision of positive law. *Hamilton v. McClaughry* (C. C. 1905), 136 Fed. 445.

Where a court-martial has jurisdiction, error in its exercise can not be reviewed in a proceeding by an Army officer, sentenced by such court to be dismissed from the service, to recover arrears of pay, on the ground that he never was dismissed in fact, by reason of the failure of the President

of the United States to approve the sentence. And specifications of a charge, tried by a court-martial, not objected to for insufficiency on the trial, will not be held on their face incapable of sustaining the charge, on review of such proceedings. *U. S. v. Fletcher* (1893), 13 Sup. Ct. 552, 554, 555, 148 U. S. 84, 37 L. Ed. 378.

Review by supreme court of proceedings of military commission, see *Ex parte Valandigham* (1863), 1 Wall. 243, 251, 17 L. Ed. 589.

A. COMPOSITION.

Art. 4. Who may serve on courts-martial.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.

The sentence beginning "When appointing," etc., is new. It embodies "advice" to the same effect given convening authorities in *Changes No. 5* to par. 6, *Manual for Courts-Martial*, July 14, 1919.

By a proviso in sec. 4, act of Apr. 25, 1914, ante, 2499, it was provided that no distinction should be made in respect to the eligibility of any officer of the Regular Army, the organized militia while in the military service of the United States, and the volunteer forces, for service upon any court-martial, court of inquiry, or military commission.

See notes under art. 5, post.

Art. 5. General courts-martial.—General courts-martial may consist of any number of officers not less than five.

Art. 5, Code of 1916, read as follows:

"ART. 5. GENERAL COURTS-MARTIAL.—General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen, when that number can be convened without manifest injury to the service."

Notes of Decisions.

See, also, notes to art. 3, ante.

Department commander.—In the absence of legislation, or of orders from competent authority, forbidding it, personal presence within the territorial limits of his command is not essential to the validity of an order given by a department commander appointing a court-martial within such limits. He may appoint general courts-martial, and act upon the record of proceedings of the same, when outside the territorial limits of his command. (1880) 16 Op. Atty. Gen. 679.

Trial as due process of law.—Trial by a court not legally constituted is not a trial which can be said to be "due process of law." (1898) 22 Op. Atty. Gen. 137.

Number of members.—This section is merely directory to the officer appointing the court, and his decision as to the number which can be convened without manifest injury to the service, being submitted to his sound discretion, is conclusive. *Martin v. Mott* (1827), 12 Wheat. 19, 35, 6 L. Ed. 537; *Kahn v. Anderson* (1921), 254 U. S. —; 65 L. Ed. 288; (1832) 2 Op. Atty. Gen. 534; (1854) 6 Op. Atty. Gen. 506. But where the court is of the minimum number, the incompetency of one member renders the proceedings void ab initio. *Brown v. U. S.* (1906), 41 Ct. Cl. 275.

Where one of the five officers composing a court-martial was absent during part of

the trial, he was not qualified to take part in the sentence, and the tribunal in consequence not being composed of the requisite number of officers, it was not qualified to pronounce judgment. (1831) 2 Op. Atty. Gen. 414.

Where a general court-martial was, after report, required by the Secretary of War to reassemble and revise its sentence, and on reassembling two of the original were absent, but a legal quorum remained, the court might lawfully revise its sentence. (1855) 7 Op. Atty. Gen. 338.

Art. 6. Special courts-martial.—Special courts-martial may consist of any number of officers not less than three.

Art. 6, Code of 1916, read as follows:

"ART. 6. SPECIAL COURTS-MARTIAL.—Special courts-martial may consist of any number of officers from three to five, inclusive."

See notes under arts. 3 and 5, ante.

Art. 7. Summary courts-martial.—A summary court-martial shall consist of one officer.

Same as in Code of 1916.

See notes under arts. 3 and 5, ante.

B. BY WHOM APPOINTED.

Art. 8. General courts-martial.—The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe.

The second paragraph is new.

See notes under art. 5, ante.

The President is also empowered to appoint courts-martial in the particular case provided for by R. S. 1230, ante 2447.

For the authority to appoint general courts-martial in the National Guard not in the service of the United States, see sec. 103, act of June 3, 1916, ante 2559.

Notes of Decisions.

Construction.—The term "district" as used in this article has no technical military meaning but includes the territory occupied by a permanent military camp. *Ex parte Givens* (1920), 262 Fed. 702.

Power of President.—In addition to the statutory authority conferred upon him by this section, the President is also empowered to appoint general courts-martial by

virtue of being commander in chief of the Army. *Swain v. U. S.* (1897), 165 U. S. 553.

The authority of the President, under this article, to empower "the commanding officer of any district or of any force or body of troops" to appoint general courts-martial, was not exceeded by a general order giving the power stated to certain

designated camp commanders. *Givens v. Zerbst* (1921), 254 U. S. —; 65 L. Ed. 284.

Commander as accuser or prosecutor.—President as prosecutor, so as to deprive him of power to appoint court-martial under art. 72, superseded by this section, see *Swalm v. U. S.* (1897), 165 U. S. 558.

A commander of division who, upon information laid before him of grave misconduct on the part of a regimental officer in his command, directed the colonel of the regiment (from whom the information was received) to prefer charges against the alleged offender, and who saw that the charges were put in proper form, and to that extent superintended their preparation, held not to be deemed the accuser or prosecutor of such alleged offender. And it was held that where the record of a trial before a court-martial was defective, in failing to show who was the originator or signer of the charges against the accused, and who was to be treated legally as the accuser or prosecutor, evidence aliunde was admissible to supply the information. (1878) 16 Op. Atty. Gen. 107.

A general officer commanding a mili-

tary department held to have no power to appoint a court-martial for the trial of an officer under his command where he was himself the "accuser or prosecutor." (1882) 17 Op. Atty. Gen. 436.

Convening order.—A camp commander, in exerting the power which he possesses by virtue of a general order of the President, sanctioned by this article, need not refer to such order. *Givens v. Zerbst* (1921), 254 U. S. —; 65 L. Ed. 284.

Prosecutor as member of court.—Where a court-martial has jurisdiction of the person of accused, its sentence is valid, when questioned collaterally, although irregularities or errors are alleged to have occurred in its proceedings, in that the prosecutor was a member of the court and a witness on the trial. *Keyes v. U. S.* (1883), 3 Sup. Ct. 202, 204, 109 U. S. 336, 27 L. Ed. 954. And where an officer on trial, having an opportunity to object to any member of the court-martial, makes no objection to one who preferred one of the charges, and will be a witness to establish it, he consents to the court being so made up, and can not question its jurisdiction for that reason. *Keyes v. U. S.* (1879), 15 Ct. Cl. 532.

Art. 9. Special courts-martial.—The commanding officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable; and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

Same as in Code of 1916.

For the authority to appoint special courts-martial in the National Guard not in the service of the United States, see sec. 104, act of June 3, 1916, ante, 2500.

Art. 10. Summary courts-martial.—The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: *Provided*, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him.

Same as in Code of 1916.

For the authority to appoint summary courts-martial in the National Guard not in the service of the United States, see sec. 105, act of June 3, 1916, ante 2561.

Art. 11. Appointment of trial judge advocates and counsel.—For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and for each general court-martial one or more assistant trial judge advocates and one or more assistant defense coun-

sel when necessary: *Provided, however,* That no officer who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, or assistant defense counsel in any case shall subsequently act as staff judge advocate to the reviewing or confirming authority upon the same case.

Article 11, Code of 1916, read as follows:

"ART. 11. APPOINTMENT OF JUDGE ADVOCATES.—For each general or special court-martial the authority appointing the court shall appoint a judge advocate and for each general court-martial one or more assistant judge advocates when necessary."

C. JURISDICTION.

Art. 12. General courts-martial.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: *Provided,* That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy: *Provided further,* That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interest of the service shall so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said article shall be observed.

The second proviso is new.

On Jan. 22, 1919, shortly after the armistice in the World War, the War Department issued instructions that "in view of the cessation of hostilities and the reestablishment of conditions approximating those of peace within the territorial limits of the United States, the propriety of observing limitations upon the punishing powers of courts-martial as established by Executive order of Dec. 15, 1916, is obvious," and directed that trial by general court-martial within the territorial limits of the United States should be restricted to cases where adequate punishment could not be imposed by a special or summary court or under art. 104, post. The provisions of this telegram were merely directory, however, and concerned only the punishment to be inflicted, and until the enactment of the above article, containing this new proviso, an offense which was capital only in time of war (e. g., arts. 58, 59, 86) had to be tried by general court-martial so long as a technical state of war existed. This made necessary the trial by general court-martial of many minor offenses which would otherwise have been tried by special or summary court. The reason for now permitting such cases to be sent to a special court, but not to a summary court, is probably found in the greatly reduced punishing power of the summary court, under the new articles. See art. 14, post.

Notes of Decisions.

See notes under arts. 3 and 5, ante.

Power to adjudge forfeiture.—The monthly compulsory allotment of pay under the act of Oct. 6, 1917, as amended, ante 1723, voluntary allotments under Class B of that act, 1739, ante, Liberty Loan allotments made during the World

War under 1720, ante, and premiums on war risk insurance, are not affected by sentences of courts-martial imposing a forfeiture of pay. (1918) 24 Comp. Dec. 621.

"Military law" defined.—U. S. v. McDonald (D. C. 1920), 265 Fed. 754.

Art. 13. Special courts-martial.—Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: *Provided,* That the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

Art. 14.] MILITARY LAWS OF THE UNITED STATES.

Special courts-martial shall not have power to adjudge confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months.

Art. 13, Code of 1916, read as follows:

"ART. 13. SPECIAL COURTS-MARTIAL.—Special courts-martial shall have power to try any person subject to military law, except an officer, for any crime or offense not capital made punishable by these articles: *Provided*, That the President may, by regulations, which he may modify from time to time, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

Special courts-martial shall not have power to adjudge dishonorable discharge, nor confinement in excess of six months, nor to adjudge forfeiture of more than six months' pay."

See notes under arts. 3, 5, and 12, ante.

Art. 14. Summary courts-martial.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a member of the Army Nurse Corps, a warrant officer, an Army field clerk, a field clerk Quartermaster Corps, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: *Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial: *Provided further*, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay.

The following portion of the first paragraph is new: "a member of the Army Nurse Corps, a warrant officer, an Army field clerk, a field clerk Quartermaster Corps." The words, "which he may modify from time to time," which followed the word "regulations," in the second proviso of the first paragraph have been omitted. The second paragraph of art. 14, Code of 1916, read as follows:

"Summary courts-martial shall not have power to adjudge confinement in excess of three months, nor to adjudge the forfeiture of more than three months' pay: *Provided*, That when the summary court officer is also the commanding officer no sentence of such summary court-martial adjudging confinement at hard labor or forfeiture of pay, or both, for a period in excess of one month shall be carried into execution until the same shall have been approved by superior authority."

See notes under arts. 3, 5, and 12, ante.

Art. 15. Jurisdiction not exclusive.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Same as art. 15, Code of 1916, except that the word "jurisdiction" is inserted in the title and the words "by statute or" in the text; the word "lawfully," which appeared in the former article, preceding the word "triable," has been omitted.

Notes of Decisions.

Jurisdiction of civil courts.—A district court has jurisdiction to indict and try a person charged with having forged an obligation of the United States with intent to defraud, which is made an offense against the United States by R. S. 5414, sec. 148,

act of Mar. 4, 1909 (35 Stat. 1115), although he was at the time an officer of the Army, and the alleged offense was committed at a military post, and with intent to defraud an enlisted soldier, where the accused has since been discharged from the

Army without any action against him having been taken by the military authorities; there being no provision, either constitutional or statutory, conferring exclusive jurisdiction on courts-martial to punish such offense. *Neall v. United States* (1902), 118 Fed. 699, 56 C. C. A. 31.

This article does not impliedly deprive civil courts of concurrent jurisdiction. *U. S. v. Hirsch* (D. C. 1918), 254 Fed. 109; *People v. Denman* (Calif. 1918), 177 Pac. 461.

Jurisdiction of military commission.—A person committing an offense in a place where the Federal courts are closed by civil war, and arrested and tried in a place where the Federal courts are open, can not be tried by military commission. In *re Murphy* (C. C. 1867), Fed. Cas. No. 9,947. Nor can a person be tried by a military commission for a murder committed in a rebel country five months after hostilities have

terminated and the rebel army has surrendered. In *re Egan* (C. C. 1866), Fed. Cas. No. 4,303.

The crime of murdering the President of the United States in time of civil war is triable by a military commission. Ex parte *Mudd* (D. C. 1868), Fed. Cas. No. 9,899.

Jurisdiction of provost courts.—Provost courts are military courts having a well-known jurisdiction, which is limited exclusively to minor offenses, tending to disorder and breaches of the peace, by soldiers and citizens within the lines of an army, and occupy with reference to such offenses a similar position with that of police courts in our cities. *Field, J.*, dissenting, *Mechanics*, etc., *Bank v. Union Bank* (1874), 22 Wall. 276, 301.

For jurisdiction of a provost court of the militia not in Federal service, see *United States v. Wolters* (D. C. 1920), 268 Fed. 69.

Art. 16. Officers; how triable.—Officers shall be triable only by general and special courts-martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank.

Same as in Code of 1916, except that the words "and special" are new.

Notes of Decisions.

Discretion of commanding officer.—This provision is not prohibitory but directory only upon the convening authority. Its effect is to leave to the discretion of that officer, as the *conclusive* authority and judge, the determination of the rank of the members, with only the general instruction that superiors in rank to the accused shall be selected, so far as the exigencies and interests of the service will permit. *Mullan v. U. S.* (1891), 140 U. S. 240.

Inferiority in rank or grade.—That one of the officers composing a court-martial is junior in rank and another inferior in grade

to the accused, does not of itself render either of them incompetent to sit. (1882) 17 Op. Atty. Gen. 397.

Whether the appointment on a general court-martial of officers inferior in rank to accused can be avoided is committed to the discretion of the appointing officer, who must be presumed to have acted in pursuance of law, and the sentence of a court-martial can not be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was avoidable. *Swaim v. U. S.* (1897), 17 Sup. Ct. 448, 450, 165 U. S. 553, 41 L. Ed. 823.

D. PROCEDURE.

Art. 17. Trial judge advocate to prosecute; counsel to defend.—The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel.

Article 17, Code of 1916, read as follows:

"ART. 17. JUDGE ADVOCATE TO PROSECUTE.—The judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the

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direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented before the court by counsel of his own selection for his defense, if such counsel be reasonably available, but should he, for any reason, be unrepresented by counsel, the judge advocate shall from time to time throughout the proceedings advise the accused of his legal rights."

Art. 18. Challenges.—Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause.

Art. 18, Code of 1910, read as follows:

"ART. 18. CHALLENGES.—Members of a general or special court-martial may be challenged by the accused, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time."

Notes of Decisions.

Challenges.—The decision of a court-martial in determining the validity of a challenge to one of its members can not be reviewed in a collateral action. *Swaim v. U. S.* (1897), 165 U. S. 531; 17 Sup. Ct. 448; 41 L. Ed. 823.

It is a matter within the jurisdiction of a court-martial to determine the competency of a member when challenged. In *re Feinler* (Sup. Ct., D. C., 1921), 49 Wash. L. R. 147.

Art. 19. Oaths.—The trial judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: "You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God."

When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form: "You, A. B., do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate, and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God."

All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: "You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God."

Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God."

In case of affirmation the closing sentence of adjuration will be omitted.

Same as art. 19, Code of 1916, except that the word "trial" is inserted in each instance before the words "judge advocate"; the words "or duly announced by the court" and "upon a challenge or upon the findings or sentence" in the first paragraph are new; the words "will faithfully and impartially perform the duties of a trial judge advocate, and" in the second paragraph are new; the concluding words of the first sentence of the former second paragraph were "shall be duly disclosed by the same," the last three words thereof being now omitted. These changes conform to the procedure under art. 20, post.

Notes of Decisions.

Oath of judge advocate.—The judge advocate of a court-martial is required to be sworn; and if the proceedings of the court do not show that he was sworn, it is to be presumed that he was not, and the proceedings may be regarded as irregular and

void. (1838) 3 Op. Atty. Gen. 397; (1840) Id. 544.

In such cases the accused may be put upon another trial; but not before the same officers who constituted the first court. (1838) 3 Op. Atty. Gen. 397.

Art. 20. Continuances.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just.

Same as in Code of 1916.

Art. 21. Refusal or failure to plead.—When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty imprudently or through lack of understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty.

Art. 21, Code of 1916, read as follows:

"ART. 21. REFUSAL TO PLEAD.—When the accused, arraigned before a court-martial, from obstinacy and deliberate design stands mute or answers foreign to the purpose, the court may proceed to trial and judgment as if he had pleaded not guilty."

Art. 22. Process to obtain witnesses.—Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions.

Same as art. 22, Code of 1916, except that the word "trial" is inserted before the words "judge advocate."

Sec. 25 of the sundry civil appropriation act of Mar. 3, 1863 (12 Stat. 754), first gave courts-martial this power. That section read as follows:

"That every judge advocate of a court-martial or court of inquiry hereafter to be constituted, shall have power to issue the like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or district where such military courts shall be ordered to sit may lawfully issue."

For power to issue process to secure the attendance and testimony of witnesses before courts-martial in the National Guard, not in the service of the United States, see sec. 192, act of June 3, 1916, ante 2562.

Notes of Decisions.

Power to compel attendance of witnesses in general.—Prior to the enactment of the act of Mar. 3, 1863, above cited, there was no law authorizing a court-martial to compel the attendance of witnesses who were not in the military service. (1859) 9 Op. Atty. Gen. 311.

Construction of section in general.—The provisions of this section apply only to military courts. (1890) 19 Op. Atty. Gen. 501.

Process for witness.—The process authorized by this section may be directed to the officers who by the practice of the service are ordinarily charged with the duty of performing the executive business of courts-martial. (1868) 12 Op. Atty. Gen. 501.

In securing the testimony of a witness the court is restricted to the means which it is thus authorized to employ. It can not inflict any punishment where the power to impose it is not clearly conferred by Congress. (1885) 18 Op. Atty. Gen. 278.

Art. 23. Refusal to appear or testify.—Every person not subject to military law who, being duly subpoenaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than \$500 or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses: *Provided further*, That every person not subject to military law, who before any court-martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or investigation before it or had under any of the provisions of this act, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the Act of March 4, 1909, entitled "An Act to codify, revise, and amend the penal laws of the United States" (volume 35, United States Statutes at Large, page 1088), or any amendment thereof, shall be punished as therein provided.

This article became effective on June 4, 1920. The second proviso is new.

Payment of fees to witnesses is regularly included in provision for "Pay and so forth of the Army" in acts making appropriations for the support of the Army.

Notes of Decisions.

Production of documentary evidence.—Where a witness subpoenaed to produce certain documents before a military court-martial testified that he had destroyed the documents before service of the subpoena, his failure to produce did not constitute a willful refusal to produce such documents

within this section. *U. S. v. Praeger* (D. C. 1907), 149 Fed. 474.

Payment of fees.—This section requires that the legal fees of the witness shall be first duly paid or tendered in order to lay the foundation for a prosecution thereunder. A mere statement in the subpoena,

signed by the judge advocate of the court-martial, to the effect that the United States tenders or guarantees the payment of the authorized fees, is not a sufficient compliance. (1901) 23 Op. Atty. Gen. 424.

Prosecution under this section.—In a proceeding to punish a civilian for refusal to testify before a general military court-martial, under this section, the parties may waive a jury by written stipulation. *U. S. v. Praeger* (D. C. 1907), 149 Fed. 474.

Art. 24. Compulsory self-incrimination prohibited.—No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him.

Art. 24, Code of 1916, read as follows:

"ART. 24. COMPULSORY SELF-INCRIMINATION PROHIBITED.—No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him."

Notes of Decisions.

Self-incriminating testimony.—Where a civilian, subpoenaed to appear before a court-martial, was advised by competent counsel that certain questions asked of him with reference to a publication concerning an army rifle contest, if answered, might subject him to a civil or criminal prosecution for libel, and for this reason he refused to answer on advice of counsel, and not from any evil intent, or with legal malice, his refusal would not constitute a violation of this section. And the decision of the court-martial that the questions asked were proper would not be conclusive on the civil courts of the question whether the witness was guilty of contempt in refusing to answer. *U. S. v. Praeger* (D. C. 1907), 149 Fed. 474.

Where at a trial by a court-martial a witness objected to answering a question on the ground of self-incrimination, but the court required him to answer, the judge advocate reading in support of this requirement *R. S. 860* (repealed), that, if the

court committed an error in compelling the witness to answer the error was not such as to require a disapproval of the proceedings. (1883) 17 Op. Atty. Gen. 616.

Paper seized from accused.—The fact that private papers are unlawfully seized from a defendant does not render them incompetent to be used as evidence against him in a court-martial proceeding, even though he objected to such use at the time the papers were offered in evidence. (1809) 22 Op. Atty. Gen. 589. But see *Gouled v. U. S.* (1921), 254 U. S. —; 65 L. Ed. 311.

Comparison of handwriting.—Evidence of handwriting, by comparison of hands, is inadmissible on a trial by court-martial, excepting where the writing, acknowledged to be genuine, is already in evidence in the case, or the disputed writing in an ancient document. The admission of such evidence is error, for which, if it was material to the finding of the court, the sentence of the latter should be set aside. (1882) 17 Op. Atty. Gen. 310.

Art. 25. Depositions—When admissible.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of 100 miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of

trial or hearing: *Provided*, That testimony by deposition may be adduced for the defense in capital cases.

Same as in Code of 1916.

Notes of Decisions.

Depositions.—Depositions should not be admitted in courts-martial, except under certain restrictions, and in cases not capital. Such courts should adhere to rules of evidence established in courts of common law jurisdiction. (1820), 2 Op. Atty. Gen. 344.

Witnesses who were not in the military service formerly could not be compelled to make depositions to be used in evidence before courts-martial on the trial of cases not capital. (1859), 9 Op. Atty. Gen. 311. See also notes under art. 22, ante.

Art. 26. Depositions—Before whom taken.—Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

Same as in Code of 1916.

Art. 27. Courts of inquiry—Records of, when admissible.—The record of the proceedings of a court of inquiry may, with the consent of the accused, be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer.

Same as in Code of 1916, except that the words "with the consent of the accused," in the second line, are new.

Art. 28. Certain acts to constitute desertion.—Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.

Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and, where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter.

The first paragraph is the same as art. 28, Code of 1916, except that the former title of that article was "Resignation without acceptance does not release officer." The second paragraph is the same as art. 29, Code of 1916. The third paragraph is new.

Notes of Decisions.

Resignation.—By construction of this section it seems that an officer remains such, although he has resigned, until such time as he receives due notice of the acceptance of such resignation. So, where a resignation has been accepted, and the officer has received due notice thereof, a revocation by

the President of the order accepting such resignation will not work his restoration. *Mimmack v. U. S.* (1874), 10 Ct. Cl. 584. And see *U. S. v. Corson* (1885), 114 U. S. 619, 621, 5 Sup. Ct. 1158, 29 L. Ed. 254; *Bennett v. U. S.* (1884), 19 Ct. Cl. 379; *Palen v. Sama*, Id. 369.

Art. 29. Court to announce action.—Whenever the court has acquitted the accused upon all specifications and charges, the court shall at once announce such result in open court. Under such regulations as the President may prescribe, the findings and sentence in other cases may be similarly announced.

This article is new.

Art. 30. Closed sessions.—Whenever a general or special court-martial shall sit in closed session, the trial judge advocate and the assistant trial judge advocate, if any, shall withdraw; and when their assistance in referring to the recorded evidence is required, it shall be obtained in open court, and in the presence of the accused and of his counsel, if there be any.

Same as art. 30, Code of 1916, except that the word "trial" is inserted before the words "judge advocate" wherever they occur, and the words "their legal advice or" are omitted after the word "when."

Notes of Decisions.

Presence of judge advocate.—That a court-martial trying a naval officer permitted the judge advocate to be present for a short time during a closed session of the court, in express violation of sec. 2, act of July 27, 1892 (27 Stat. 277), though a disregard of

the defendant's legal rights, was nevertheless an error in procedure only, and was therefore not ground for a writ of habeas corpus. *Ex parte Tucker* (D. C. 1913), 212 Fed. 569.

Art. 31. Method of voting.—Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who will forthwith announce the result of the ballot to the members of the court. The law member of the court, if any, or if there be no law member of the court, then the president, may rule in open court upon interlocutory questions, other than challenges, arising during the proceedings: *Provided*, That unless such ruling be made by the law member of the court if any member object thereto the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *And provided further*, That if any such ruling be made by the law member of the court upon any interlocutory question other than an objection to the admissibility of evidence offered during the trial, and any member object to the ruling, the court shall likewise be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *Provided further, however*, That the phrase, "objection to the admissibility of evidence offered during the trial," as used in the next preceding proviso hereof, shall not be construed to include questions as to the order of the introduction of witnesses or other evidence, nor of the recall of witnesses for further examination, nor as to whether expert witnesses shall be admitted or called upon any question, nor as to whether the court shall view the premises where an offense is alleged to have been committed, nor as to the competency of witnesses, as, for instance, of children, witnesses alleged to be mentally incompetent, and the like, nor as to the insanity of accused, or whether the existence of mental disease or mental derangement on the part of the accused has become an issue in the trial, or accused required to submit to physical examination, nor whether any argument or statement of counsel for the accused or of the trial judge advocate is improper, nor any ruling in a case involving military strategy or tactics or correct military action; but, upon all these questions arising on the trial, if any member object to any ruling of the

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law member, the court shall be cleared and closed and the question decided by majority vote of the members in the manner aforesaid.

Art. 31, Code of 1916, read as follows:

"ART. 31. ORDER OF VOTING.—Members of a general or special court-martial, in giving their votes, shall begin with the junior in rank."

Art. 32. Contempts.—A military tribunal may punish as for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder: *Provided*, That such punishment shall in no case exceed one month's confinement, or a fine of \$100, or both.

Art. 32, Code of 1916, read as follows:

"ART. 32. CONTEMPTS.—A court-martial may punish at discretion, subject to the limitations contained in article fourteen, any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder."

Notes of Decisions.

Refusal to testify.—A court-martial has no final jurisdiction over a civilian subpoenaed to testify before it or power to punish him for contempt for refusing to testify. *United States v. Praeger* (D. C. 1907), 149 Fed. 474; (1885) 18 Op. Atty. Gen. 278.

Contempt.—Contempts, broadly considered, are of two kinds—direct and constructive. Contempts committed in the presence of the court, sitting judicially, or

so near as to interfere with the orderly course of procedure, are direct contempts. Contempts committed, not in presence of the court, but which tend, by their operation, to interrupt, obstruct, embarrass, or prevent the due and orderly administration of justice, are constructive contempts. *Indianapolis Water Co. v. The American Strawboard Co.* (C. C. 1896), 75 Fed. Rep. 972.

Art. 33. Records—General courts-martial.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the trial judge advocate; but in case the record can not be authenticated by the president and trial judge advocate, by reason of the death, disability, or absence of either or both of them, it shall be signed by a member in lieu of the president and by an assistant trial judge advocate, if there be one, in lieu of the trial judge advocate; otherwise by another member of the court.

Same as art. 33, Code of 1916, to the semicolon, except that the word "trial" is inserted before the words "judge advocate"; thereafter the former art. 33 reads as follows:

"but in case the record can not be authenticated by the judge advocate, by reason of his death, disability, or absence, it shall be signed by the president and an assistant judge advocate, if any; and if there be no assistant judge advocate, or in case of his death, disability, or absence, then by the president and one other member of the court."

Notes of Decisions.

Evidence outside record.—Evidence that the accused, at the time of his trial and conviction for a homicide before a general court-martial, had a military status, is admissible on habeas corpus where, except for the form of the charge, the court-martial record failed to establish that the

accused belonged to the Army, but did establish on its face the power to convene the court-martial, so that the authority of that court to decide the particular subject before it was undoubted. *Givens v. Zerbst* (1921), 254 U. S. —; 65 L. Ed. 284.

Art. 34. Records—Special and summary courts-martial.—Each special court-martial and each summary court-martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may from time to time prescribe.

Same as in Code of 1916.

Art. 35. Disposition of records—General courts-martial.—The trial judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in command the original record of the proceedings of such court in the trial of each case. All records of such proceedings shall, after having been acted upon, be transmitted to the Judge Advocate General of the Army.

Same as art. 35, Code of 1916, except that the word "trial" is inserted before the words "judge advocate", and the word "finally", which appeared in the former article, preceding the word "acted", has been omitted.

Notes of Decisions.

Matters constituting record.—It is not sufficient to return the inferences or conclusions of courts-martial, nor mere statements of the evidence, or books or papers inspected; but the evidence itself on which they based judgment must be returned. And where the jurisdiction of the court was called into question on account of the early date of the enlistment, the record ought to have contained authentic evidence of the terms and period of the enlistment, that the revising officer might judge whether or not the court had jurisdiction. (1840) 3 Op. Atty. Gen. 545.

Amendment of records.—The Secretary of War is without authority to correct, amend, or to take any action inconsistent with the record of a court-martial duly convened

upon a proper and sufficient charge. This power is inherent in a court-martial; but such correction or amendment can be made only when the court-martial is in session, and when at least five of the members of the court who acted upon the trial are present, and then in the presence of the judge advocate. (1900), 23 Op. Atty. Gen. 23.

Use as evidence.—An authenticated copy of a record of trial by Navy summary court-martial, which is required to be transmitted to, and kept on file in, the Navy Department, for a period of two years from date of trial, is admissible in a civil trial in a Federal court as an official document, under R. S. 882. *Cohn v. U. S.* (C. C. A. 1919), 258 Fed. 355.

Art. 36. Disposition of records—Special and summary courts-martial.—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to such general headquarters as the President may designate in regulations, there to be filed in the office of the judge advocate. When no longer of use, records of summary courts-martial may be destroyed.

Same as in Code of 1916, except that the words "special and" are omitted after the words "records of" in the last sentence.

Art. 37. Irregularities—Effect of.—The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: *Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: *Provided further*, That the omission of the words "hard labor" in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments.

Same as in Code of 1916.

Art. 38. President may prescribe rules.—The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually.

Same as in Code of 1916, except that the words between the words "military tribunals" and the first proviso are new.

E. LIMITATIONS UPON PROSECUTIONS.

Art. 39. As to time.—Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: *Provided*, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: *Provided further*, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: *And provided further*, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.

Same as in Code of 1916.

The joint resolution of Mar. 3, 1921, ante 2835, providing that certain statutes the operation of which is contingent upon the existence of a state of war should be construed as if the World War had ended on Mar. 3, 1921, was, by its terms, not to apply to the offense of desertion. See 2238, ante.

Notes of Decisions.

Courts to which limitation is applicable.—The limitation prescribed by this section does not apply to courts of inquiry. The objects of a court of inquiry are not confined to investigation as preparatory to a court-martial, but extend to the legal procurement of information of any sort material to the military service or the discipline and government of the Army. (1863) 6 Op. Atty. Gen., 239.

Desertion in time of peace.—A soldier who deserted after the signing of the protocol between the United States and Spain, and while a state of peace actually existed, and nothing remained to be done to conclude peace, except the settlement of the details of the treaty, is within this section as amended; the limitation not to begin till the end of his term of enlistment. In re Cadwallader (C. C. 1904), 127 Fed. 881.

The amendment to this section, relating

to desertion in time of peace, does not furnish an absolute bar to a prosecution for desertion after two years from the end of the term for which the person was mustered into the service. It operates only on condition that the desertion was in time of peace, and not in the face of the enemy, and on the further condition that the party has remained within the United States for two years between the end of the enlistment and the arraignment. In re Townsend (D. C. 1904), 133 Fed. 74.

Suspension of limitations.—Where a prosecution of an officer before a court-martial was instituted, and he was arraigned within the two years required by law, and pleaded the pendency of civil proceedings arising in the matter, whereupon the proceedings of the court-martial were suspended until a period after the lapse of the two years, limitations could not then be pleaded in

the case. (1854) 6 Op. Atty. Gen. 506. See, further, on this point (1842), 3 Op. Atty. Gen. 749.

Absence or other manifest impediment.—The word "absented," as used in the exception in the first sentence of this section (Code of 1874), means absence from the jurisdiction of the military courts. The words "other manifest impediment" mean only such impediments as operate to prevent the military court from exercising its jurisdiction. In *re Davison* (D. C. 1880), 4 Fed. 507. They do not mean merely want of evidence or ignorance as to the offender or offense by the military authorities, but import something akin to absence—want of power or a physical inability to bring the party charged to trial (1873) 14 Op. Atty. Gen. 266. The concealment of an offense by the accused is not a "manifest impediment," and does not prevent the limitation from running in his favor. (1872) 14 Op. Atty. Gen. 52.

The limitation begins to run from the commission of the offense, excepting in a case where, by reason of "manifest impediment," the accused is not amenable to justice within two years from that time. In such case it begins to run from the removal of the impediment. (1876) 15 Op. Atty. Gen. 152.

The exception contained in the first sentence of this section (Code of 1874), which excepts from the limitation prescribed any person who, "by reason of having absented himself, or some other manifest impediment," shall not have been amenable to justice within the period prescribed, is not of any effect, where the limitation itself would not otherwise have run. (1878) 16 Op. Atty. Gen. 170; (1879) 16 Op. Atty. Gen. 396. Hence absence without leave during the term of enlistment, in the case of a deserter, is unimportant, inasmuch as, the offense of desertion being a continuing one during such term, the limitation would not otherwise begin to run until the expiration thereof. (1876) 15 Op. Atty. Gen. 152; (1878) 16 Op. Atty. Gen. 170; (1879) 16 Op. Atty. Gen. 396.

Effect of expiration of term of service.—Under this section, a soldier may be arrested and tried, after the expiration of his term of service, for a military offense committed during such term. In *re Bird* (D. C. 1871), Fed. Cas. No. 1,428.

Desertion is a continuing offense—an offense which may endure (i. e., be continually committed) from day to day after the period of its completion. But the continuing commission thereof is limited by the obligation to serve imposed upon the deserter by his engagement. When that obligation ceases to exist the commission of

the offense necessarily terminates, and the limitation then begins to run in cases not excepted. So in case of desertion by an enlisted soldier (excepting where the offender has previously surrendered himself or been apprehended, or where, by reason of manifest impediment, he is not amenable to justice) the limitation begins to run from the last day of the term for which he enlisted. (1876) 15 Op. Atty. Gen. 152; (1878) 16 Op. Atty. Gen. 170.

Where the absence of the deserter continues after his term of service has expired, no presumption of law arises that he was not amenable to justice during such absence, and that his case is accordingly within the exception. The fact must be shown by evidence submitted at the trial. Nor is a plea of guilty, when it appears by the record that the order for trial was issued more than two years before the commission of the offense, to be taken as an admission by the accused of the existence of an exception withdrawing his case from the limitation. (1878) 16 Op. Atty. Gen. 170.

Effect of dismissal from service.—Where charges were preferred against an officer in the army for disobedience of orders in June, 1856, and in September following, for other reasons, he was dismissed from the service by the President, no court-martial having been ordered to investigate the charge against him, it was held that, on his being restored to the army, he could not be tried on the charges pending against him at the time of his dismissal after the lapse of two years since the commission of the alleged offenses. (1858) 9 Op. Atty. Gen. 181.

Waiver of limitation.—This limitation can not be waived by the accused, nor can he, even with his consent, be tried by a general court-martial ordered after the time prescribed. (1820) 1 Op. Atty. Gen. 383; (1853) 6 Op. Atty. Gen. 239.

Determination of limitation.—The limitation prescribed in this section is a matter of defense in a trial for desertion, the tribunal having jurisdiction to try the charge is the one to determine whether the bar of the statute has attached, and civil courts have no authority to interfere in the matter. In *re White* (C. C. 1883), 17 Fed. 723; In *re Davison* (C. C. 1884), 21 Fed. 618, 619; In *re Zimmerman* (C. C. 1887), 30 Fed. 176, 177.

It is for the prosecution to show, as a matter of fact, in some other way than by the form of the pleadings, that by reason of having absented himself, or of some other manifest impediment, the accused was not amenable to justice within the two years. (1878) 16 Op. Atty. Gen. 170.

Art. 40.] MILITARY LAWS OF THE UNITED STATES.

Art. 40. As to number.—No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

No authority shall return a record of trial to any court-martial for reconsideration of—

- (a) An acquittal; or
- (b) A finding of not guilty of any specification; or
- (c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of war; or
- (d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial, in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited.

This article is almost entirely new. Art. 40, Code of 1916, read as follows:

"ART. 40. AS TO NUMBER.—No person shall be tried a second time for the same offense."

The provisions of this article respecting the return of records for reconsideration were embodied in General Orders No. 88, War Dept., dated July 14, 1919, effective August 10, 1919; and are by this article for the first time made statutory.

Notes of Decisions.

Construction of section in general.—This section is borrowed from the common law, and is not held, either in civil or military tribunals, to preclude the accused from having a second trial on his own motion. It is error for a court-martial to refuse a second trial to the accused when the same has been ordered by the President. The plea of *autrefois acquit*, or *convict*, is the privilege of the accused, which he may use or waive at pleasure; if he does not choose to use it, courts will not take notice of it so as to bar a trial. (1818) 1 Op. Atty. Gen. 233.

Proceedings included.—A defendant, tried by court-martial under A. W. 58, post, for desertion based on failure to file a questionnaire and fleeing to escape military duty, and acquitted, can not thereafter be tried by a Federal district court for failing to answer his questionnaire. *U. S. v. Block* (D. C. 1920), 262 Fed. 205.

An officer, who was convicted of violation of A. W. 95, post, could not, in the same trial, on identical specifications and the same proof, be tried for violation of A. W. 96, post, since the court-martial, having sentenced him to dismissal under A. W. 95 (the sole penalty which may be adjudged under that article) was without power to try him for violation of A. W. 96, and sentence him to imprisonment thereunder. *Ex parte Henkes* (D. C. 1919), 207 Fed. 276; reversed (C. C. A. 1921), — Fed. —.

A plea before a court-martial of a former arrest and discharge is bad; a former trial only is a defense under this section. (1819) 1 Op. Atty. Gen. 294.

The plea of *autrefois acquit*, averring a former trial and acquittal for manslaughter in the supreme court of a State upon the same evidence as must be used to sustain the charge of unofficerlike or ungentlemanlike conduct under the eighty-third of the (former) articles of war, is not a bar to proceedings in a court-martial for the trial of an officer on such charge. (1842) 8 Op. Atty. Gen. 749; (1854) 6 Op. Atty. Gen. 413; (1854) 6 Op. Atty. Gen. 506.

An acquittal by a general court-martial, established under act of March 2, 1863, for punishing offenses when committed by persons in the service of the United States, can not be pleaded in bar to an indictment for murder, under the laws of Tennessee. *State v. Rankin* (1867), 44 Tenn. (4 Cold.) 145; *In re Fair* (C. C. 1900), 100 Fed. 149. See, also, *U. S. v. Cashiel* (C. C. 1863), Fed. Cas. No. 14,744. See also notes under arts. 74 and 92, post.

Separate offenses.—See *Carter v. McClaughry* (1902), 22 Sup. Ct. 181, 189, 183 U. S. 365, 46 L. Ed. 236, affirming (C. C. 1900) 105 Fed. 614.

F. PUNISHMENTS.

Art. 41. Cruel and unusual punishments prohibited.—Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body, are prohibited.

Art. 41, Code of 1816, read as follows:

"ART. 41. CERTAIN KINDS PROHIBITED.—Punishment by flogging, or by branding, marking, or tattooing on the body is prohibited."

Notes of Decisions.

Flogging.—See (1816) 1 Op. Atty. Gen. 187.

Art. 42. Places of confinement—When lawful.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year: *Provided*, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: *Provided further*, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: *Provided further*, That persons sentenced to dishonorable discharge and to confinement not in a penitentiary shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary.

The language between the words "offense of a civil nature" and the first proviso has been changed. Art. 42, Code of 1816, in that place read as follows: "by some statute of the United States, or at the common law as the same exists in the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is one year or more."

Authority is given by 532, ante, for the confinement of military prisoners convicted by courts-martial or other military tribunals, in United States, State, Territorial, or District penitentiaries, provided the offense for which any such prisoner is convicted shall be a crime under State or Federal law punishable by imprisonment in a penitentiary. All military offenders not so imprisoned shall be confined in the United States Disciplinary Barracks, formerly known as the military prison.

Notes of Decisions.

Constitutionality.—The procedure required by the articles of war, viz., the court-martial prescribing the kind and duration of the punishment while the place of its execution is left to the designation of the reviewing or confirming authority, is legal and unobjectionable. *Ex parte Givens* (1920), 262 Fed. 702; affirmed, *sub nom.* *Givens v. Zerbst* (1921) 254 U. S. —; 65 L. Ed. 284.

Army regulations.—Pursuant to this section, see *In re Brodie* (1904), 128 Fed. 665, 63 C. C. A. 419.

Penitentiary of District of Columbia.—Courts-martial, in cases within their lawful jurisdiction, may condemn persons to imprisonment at hard labor in the penitentiary of the District of Columbia, in punishment of crime. (1862) 10 Op. Atty. Gen. 248.

[Art. 43. **MILITARY LAWS OF THE UNITED STATES.**

Offenses punishable by confinement in penitentiary.—Under this article, when the offense is not one recognized by the laws regulating civil society, there can be no punishment by confinement in a penitentiary, but when the act charged as "conduct to the prejudice of good order and military discipline" is actually a crime against society which is punishable by imprisonment in the penitentiary, a court-martial is authorized to inflict that kind of punishment. *Ex parte Mason* (1881), 105 U. S. 606, 700, 26 L. Ed. 1213.

Disposition of prisoner sentenced to penitentiary by court-martial.—He should be conducted to the prison by the proper officer of the Department of War. (1895) 21 Op. Atty. Gen. 204.

Error in designating place of confinement.—Error in the designation of the place for carrying out the sentence of a court-martial did not involve the jurisdiction of the court-martial, but could only lead to retaining the accused for a new designation of place of confinement. *Givens v. Zerbst* (Sup. Ct. 1921), 65 L. Ed. 284.

Art. 43. Death sentence.—When lawful.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote.

Art. 43. Code of 1916, read as follows:

"ART. 43. DEATH SENTENCE.—WHEN LAWFUL.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of two-thirds of the members of said court-martial and for an offense in these articles expressly made punishable by death. All other convictions and sentences, whether by general or special court-martial, may be determined by a majority of the members present."

Art. 44. Cowardice; fraud.—Accessory penalty.—When an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.

Same as in Code of 1916.

Notes of Decisions.

Publication of sentence.—Under this section, where an officer has been convicted of fraud by a court-martial, it is bound to

cause the special publication of sentence to be made. *In re Carter* (C. C. 1899), 97 Fed. 496.

Art. 45. Maximum limits.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not exceed such limit or limits as the President may from time to time prescribe: *Provided*, That in time of peace the period of confinement in a penitentiary shall in no case exceed the maximum period prescribed by the law which, under article 42 of these articles, permits confinement in a penitentiary, unless in addition to the offense so punishable under such law the accused shall have been convicted at the same time of one or more other offenses.

This article became effective on June 4, 1920.

Art. 45, Code of 1916, read as follows:

"ART. 45. MAXIMUM LIMITS.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe."

Notes of Decisions.

Exceeding limit of punishment.—A sentence of an Army court-martial imposed upon a commissioned officer is not illegal on the ground that the punishment prescribed is in excess of the maximum punishment fixed by the President under this sec-

tion, since all the executive orders made by him under this section are expressly limited to enlisted men. *Carter v. McClaughry* (1902), 22 Sup. Ct. 181, 188, 183 U. S. 365, 382, 46 L. Ed. 238.

G. ACTION BY APPOINTING OR SUPERIOR AUTHORITY.

Art. 46. Action by convening authority.—Under such regulations as may be prescribed by the President every record of trial by general court-martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

This article is new except for the last sentence which is the same as art. 46, Code of 1916, entitled, "Approval and execution of sentence."

Notes of Decisions.

Promulgation of sentence.—The promulgation of the sentence of a court-martial does not affect the validity of the sentence. It is for the information of the public, and the military arm of the Government. *Lyon v. U. S.* (1912), 48 Ct. Cl. 30.

Cumulative sentences.—Under military law and Army Regulations, different sentences to imprisonment imposed by courts-martial upon the same offender are cumulative, and are to be executed consecutively, one upon the expiration of another in the order of their imposition. *Kirkman v. McClaughry* (1908), 160 Fed. 436, 90 C. C. A. 86, affirming order (C. C. 1907), 152 Fed. 255.

Approval or disapproval of sentence.—An indorsement by the Secretary of War upon the record of a court-martial that, "in conformity with the sixty-fifth of the rules and articles of war (embodied, on this point, in A. W. 48, post), the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President. The proceedings, findings, and sentence are approved, and the sentence will be duly executed"—is presumptively a personal approval by the President; for it is not necessary that such approval shall be evidenced by his own hand. *U. S. v. Fletcher* (1893), 13 Sup. Ct. 552, 553, 148 U. S. 84, 37 L. Ed. 378, reversing (1891), 26 Ct. Cl. 541, following *U. S. v. Page* (1891), 11 Sup. Ct. 219, 137 U. S.

673, 34 L. Ed. 828, explaining and distinguishing *Runkle v. U. S.* (1887), 7 Sup. Ct. 1141, 122 U. S. 543, 30 L. Ed. 1167.

A sentence of an Army court-martial convened by orders issued by the President does not cease to be the sentence of such court-martial, on the theory that the punishment fixed thereby must be regarded as increased, because the President, acting as the reviewing authority under this section, disapproved the findings of guilty of some of the specifications under two of the charges, and approved findings of guilty of one or more specifications under each of the charges, and of the findings of guilty of all the charges, and approved the sentence. *Carter v. McClaughry* (1902), 22 Sup. Ct. 181, 189, 183 U. S. 365, 46 L. Ed. 238.

The disapproval of the sentence of a properly constituted court-martial by the proper reviewing authority is, in legal effect, tantamount to an acquittal of the accused by the court of the offense charged, and relieves him from any and all liabilities to which his conviction would have subjected him. Hence, where the sentence of a court-martial, which found a soldier guilty of desertion, was disapproved by the proper reviewing officer, being deemed inadequate, and the soldier ordered, at his own expense, to join his regiment, and his term of enlistment had expired, there was no warrant for ordering him to further duty.

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Having been legally tried, he can not be again tried, or any other sentence imposed for that offense. (1907) 26 Op. Atty. Gen. 230.

Ordering new sentence.—A commanding officer, charged with the duty of reviewing the proceedings of a court-martial, may approve or disapprove or mitigate, but can not order a new sentence of a more severe character. *Swalm v. U. S.* (1893), 28 Ct. Cl. 173.

Confirmation of sentence.—The sentence of a court-martial is not final until the

officer ordering the court shall confirm it, which confirmation is the judgment of the law, pronounced by the court on the verdict of a jury. The sentence bears a close analogy to such confirmation. (1888) 19 Op. Atty. Gen. 107.

See also, notes to art. 48, post.

Effect of conviction.—Conviction of a military offense by court-martial does not make a witness incompetent to testify in the civil courts in a criminal prosecution. *Reed v. U. S.* (C. C. A. 1918), 252 Fed. 21.

Art. 47. Powers incident to power to approve.—The power to approve the sentence of a court-martial shall be held to include:

(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

(b) The power to approve or disapprove the whole or any part of the sentence;

(c) The power to remand a case for rehearing, under the provisions of article 50½.

Same as art. 47, Code of 1916, except for the addition of subdivision (c).

Art. 48. Confirmation—When required.—In addition to the approval required by article forty-six, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

(a) Any sentence respecting a general officer;

(b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division;

(c) Any sentence extending to the suspension or dismissal of a cadet; and

(d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution, subject to the provisions of article 50½, upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division.

When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary.

Same as art. 48, Code of 1916, except that the words in subdivision (d), "subject to the provisions of article 50½", are new.

For the approval required of a sentence of dismissal from service or dishonorable discharge imposed by National Guard courts-martial, not in the service of the United States, see sec. 107, act of June 3, 1916, ante 2665.

Notes of Decisions.

Construction of section in general.—This section is for the government of the Army, and operates upon commanding generals and the Secretary of War. *Fletcher v. U. S.* (1891), 26 Ct. Cl. 541.

Nature of action of President in general.—The action of the President under this section is judicial in its character. *Runkle v. U. S.* (1887), 7 Sup. Ct. 1141, 1145, 122 U. S. 543, 30 L. Ed. 1167.

Confirmation or approval of sentence.—A sentence dismissing an officer in time of peace does not become operative until approved by the President; up to that time he is entitled to his pay. *Fletcher v. U. S.* (1891), 26 Ct. Cl. 541.

The power of the President over a sentence is a power over the whole of it. He may approve, reject, or mitigate the same at pleasure. He may consider the provocation, if any, which led to the offense, and all the facts and circumstances which properly bear upon the justice or injustice of the sentence. (1829) 2 Op. Atty. Gen. 287. He may mitigate a sentence of death pronounced by a naval court-martial by substituting a milder punishment in its stead. (1820) 1 Op. Atty. Gen. 327.

Approval in part.—The fact that findings of guilty upon certain specifications supporting a charge are set aside by the President, where others are approved, does not affect the validity of the sentence imposed by the court on such charge, or require its diminution. *Carter v. McClaughry* (C. C. 1900), 105 Fed. 614; order affirmed (1902), 22 Sup. Ct. 181, 183 U. S. 365, 46 L. Ed. 286.

What constitutes.—An order issued by the Secretary of War, announcing the approval of a sentence and stating that the President has been pleased to remit a part, is the act of the President, and legally confirms the sentence. *Runkle v. U. S.* (1884), 19 Ct. Cl. 396.

An indorsement by the Secretary of War upon the proceedings and sentence of a court-martial, reciting that "in conformity with the sixty-fifth of the rules and articles of war" such proceedings "have been forwarded to the Secretary of War for the action of the President of the United States, and the proceedings, findings, and sentence are approved," is presumptively an approval by the President. *Ide v. U. S.* (1893), 14 Sup. Ct. 188, 189, 150 U. S. 517, 37 L. Ed. 1166, following *U. S. v. Fletcher* (1893), 18 Sup. Ct. 552, 148 U. S. 84, 37 L. Ed. 378.

Where it appears positively on the face of an order dismissing an officer that the proceedings of a court-martial had been submitted to the President by the Secretary of War, it must be inferred that the subsequent confirmation of the sentence, though in the name of the Secretary, was the act of the President. But an order issued by the Secretary of War, reciting that the proceedings of a court-martial were forwarded to him "for the action of the President," does not show, otherwise than argumentatively, that the proceedings had been laid before the President, and that the confirmation of the

sentence was the result of his judgment. *Fletcher v. U. S.* (1891), 26 Ct. Cl. 541. And where it only appears by the order of the Secretary of War, dismissing an officer, that the proceedings of the court have been "by him submitted to the President," it does not affirmatively appear that the President approved the sentence "to be dismissed the service of the United States." *Page v. U. S.* (1890), 25 Ct. Cl. 254.

Where an Army officer was sentenced to dismissal from the service, and the sentence, without having been approved by the President, was carried into effect under orders of the War Department, the subsequent recognition by the President of the vacancy thus occasioned by making an appointment during a recess of the Senate, or a nomination to that body (followed by the issuance of a commission with the consent of the Senate) of a person to fill the place of such officer, operates as a confirmation by him of the sentence and orders. (1879) 16 Op. Atty. Gen. 298.

Authentication.—An order of the President, approving the proceedings and sentence of a court-martial, will not be sufficient until it is authenticated to show that it is the result of the President's judgment, and not a mere documentary order. *Runkle v. U. S.* (1887), 7 Sup. Ct. 1141, 1145; 122 U. S. 543, 30 L. Ed. 1167.

The action of the President in matters relating to the Army which require his approval and direction may, in general, be signified through and authenticated by the head of the Department of War. Where the latter acts in such matters, he acts, in contemplation of law, under the direction of the President, and is to be regarded as the mere organ of the Executive will. This principle has been long and frequently acted upon in making known the will or determination of the President in cases of sentences of courts-martial required to be laid before him for confirmation or disapproval. It is not necessary that the President should attach his sign manual to the approval of a sentence rendered by a court-martial in time of peace, cashiering a commissioned officer, in order to make the sentence effectual. It is sufficient for this purpose if his approval of the sentence is signified through and attested by the Secretary of War in a statement signed by the latter. A statement made and signed by the Secretary of War, announcing the approval by the President of a court-martial sentence, is a sufficient authentication of the act of the President, without an express averment therein that it is made by direction of the President; the presumption being always that such direction was given. An act of the President remitting part of

a court-martial sentence may be authenticated in the same way in which his act confirming such sentence can be authenticated. Where partial remission is made at the time of confirmation, the two acts are, in practice, signified and attested together in the same way. (1877) 15 Op. Atty. Gen. 291.

Where the approval of the proceedings, findings, and sentence of a court-martial by the President is attested by an entry on the record signed by the Secretary of War, this is sufficient evidence of such approval. (1882) 17 Op. Atty. Gen. 397; (1882) 17 Op. Atty. Gen. 399.

Evidence.—Whether a sentence of court-martial has been confirmed by the President is to be determined by evidence, no specific form for this act having been provided by statute. (1879) 18 Op. Atty. Gen. 298.

Waiver of objections.—If an order in time of peace be issued by the Secretary of War dismissing an officer, and he submits without appeal to the President, and without objection for an unreasonable length of time, he must be held to have abandoned the office. *Ide v. U. S.* (1890), 25 Ct. Cl. 401; *Armstrong v. Same* (1891), 26 Ct. Cl. 387. But an officer on the retired list does not come under the rule that, if he acquiesces for a long time in the action of the Secretary of War dismissing him, it is an abandonment of the office equivalent to a resignation. *Fletcher v. U. S.* (1891), 26 Ct. Cl. 541.

Though an officer, suspended from rank and duty for twelve years with a forfeiture of half his pay, waited six years before bringing an action, it can not be held that he acquiesced in the sentence, or that he is concluded from contesting its legality by accepting the half pay without rendering service. *Swain v. U. S.* (1898), 28 Ct. Cl. 173.

Effect of approval and execution of sentence.—When the sentence of a court-martial, lawfully confirmed, has been executed, the proceedings in the case are no longer subject to review by the President. (1843) 4 Op. Atty. Gen. 271; (1877), 15 Op. Atty. Gen. 291. Even though the proceedings

were irregular. (1843) 4 Op. Atty. Gen. 274. Except for suggestion of absolute nullity in the proceedings. (1854) 6 Op. Atty. Gen. 369. The officer dismissed can be restored only by a new nomination by the President, the confirmation of the Senate, and all the requisites to constitute an original appointment to office. (1843) 4 Op. Atty. Gen. 274.

The President has no power to review the proceedings of a court-martial and annul its sentence, where the court was legally constituted, the case within its jurisdiction, and the sentence approved by the proper reviewing authority and carried into execution. (1892) 20 Op. Atty. Gen. 297.

After a sentence of an officer of the Army by a court having jurisdiction has been approved and executed by one President it can not be revised by his successor. (1854) 6 Op. Atty. Gen. 506; (1861) 10 Op. Atty. Gen. 64; *Runkle v. U. S.* (1884), 19 Ct. Cl. 396. This rule is not confined to cases in which, by the articles of war, the sentence of the court is required to be approved by the President. (1861) 10 Op. Atty. Gen. 64. Where an order of one President removing the disabilities and ordering the honorable discharge of an Army officer who had been sentenced by court-martial to dishonorable discharge, was not executed but was subsequently rescinded by a succeeding President, the original order, being executory and revocable before execution, was completely annulled thereby. (1882) 17 Op. Atty. Gen. 436.

Where the sentence of a legally constituted court-martial, in a case within its jurisdiction, has been approved by the reviewing authority and carried into execution, it can not afterwards be revised and annulled. (1882) 17 Op. Atty. Gen. 297.

Effect of disapproval of sentence.—Where the President disapproved of a sentence which was within the discretion of the court, on the ground that it was incommensurate with the offense, the case comes within the decision in *Ex parte Reed* (1879), 100 U. S. 13, that the reviewing officer did not thereby require the court to impose a more severe sentence. *Swain v. U. S.* (1893), 28 Ct. Cl. 173.

Art. 49. Powers incident to power to confirm.—The power to confirm the sentence of a court-martial shall be held to include:

(a) The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to confirm, the evidence of record requires a finding of only the lesser degree of guilt; and

(b) The power to confirm or disapprove the whole or any part of the sentence.

(c) The power to remand a case for rehearing, under the provisions of article 50j.

Same as art. 48, Code of 1916, except for the addition of subdivision (c).

Art. 50. Mitigation or remission of sentences.—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, *inter alia*, the power to mitigate or remit the whole or any part of the sentence.

Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.

When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division, may approve or confirm and commute (but not approve or confirm without commuting), mitigate, or remit and then order executed as commuted, mitigated, or remitted any sentence which under these articles requires the confirmation of the President before the same may be executed.

The power of remission or mitigation shall extend to all uncollected forfeitures adjudged by sentence of court-martial.

Same as art. 50, Code of 1916, as amended by the act of Feb. 28, 1919 (40 Stat. 1211), except that in the third paragraph the words "approve or confirm and commute (but not approve or confirm without commuting)" have been inserted before the word "mitigate," the word "commuted" inserted before the word "mitigated," and the word "then" inserted before the word "order"; and in the fourth paragraph the Code of 1916, as amended, read: "The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial."

Notes of Decisions.

Interpretation of terms.—"Commutation" and "mitigation" defined and distinguished. *Mullan v. U. S.* (1909), 212 U. S. 516, 521.

Scope of authority of President and officers.—The President may not substitute another punishment for that decreed by the court, nor suspend the pay of an officer under sentence, whose pay was not suspended by the court. (1845) 4 Op. Atty. Gen. 444.

Pardon after confirmation.—An officer who is authorized to order a general court-martial has no power under this section to pardon or mitigate the punishment adjudged by it after confirmation by him of the sentence. (1888) 19 Op. Atty. Gen. 106.

See, also, notes to art. 48, ante.

Form of pardon.—The form a pardon may assume is not important. It need not be addressed to the beneficiary. (1909) 27 Op. Atty. Gen. 179.

Time for pardon.—Where a lieutenant was sentenced by a court-martial to reduction of rank in his grade, and the sentence was carried into effect, and later the department commander remitted the sentence under the power to pardon conferred by this section, the punishment imposed by the sentence being a continuing one, the sentence could be remitted by the pardoning power, and the authority exercised by the department commander was in conformity to law. (1884) 17 Op. Atty. Gen. 656.

Effect of pardon or mitigation.—The status of a soldier is not affected by a sentence of court-martial discharging him from service, subsequently set aside. *In re Bird* (D. C. 1871), Fed. Cas. No. 1,428.

The effect of a communication sent by The Adjutant General of the Army on Mar. 20, 1866, to the Governor of Kansas, asserting that by direction of the President of the United States the disabilities result-

ing from the dismissal of A. H. C., formerly a captain in the Fourteenth Regiment Kansas Volunteer Cavalry, by sentence of a general court-martial, were thereby removed, and that the governor might remission C. If he desired to do so, was to remove all disabilities consequent upon the offense and conviction. (1909) 27 Op. Atty. Gen. 179.

A pardon can not change an existing or accomplished fact, or operate as an honorable discharge from the Army, where, as matter of fact, the person pardoned was dishonorably discharged by the sentence of a court-martial. Id.

Effect of honorable discharge after sentence.—The honorable discharge of an officer after he has been sentenced by court-martial to forfeit a month's pay and the sentence has been approved does not remit the sentence or entitle him to recover the pay forfeited. *Lyon v. U. S.* (1912), 48 Ct. Cl. 30.

Promotion while under charges.—The promotion of an officer of the Navy while under charges awaiting trial by general court-martial does not operate as a constructive pardon of the offenses charged against him. (1919), 31 Op. Atty. Gen. 419.

Art. 50½. Review; rehearing.—The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld under the provisions of this paragraph legally sufficient to support the findings and sentence, the Judge Advocate General shall so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When in a case in which the order of execution has been withheld under the provisions of this paragraph, the board of review holds the record of trial legally insufficient to support the findings or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent there-

from, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part.

When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: *Provided*, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless, in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President.

Every record of trial by general court-martial, examination of which by the board of review is not hereinbefore in this article provided for, shall nevertheless be examined in the Judge Advocate General's Office; and if found legally insufficient to support the findings and sentence, in whole or in part, shall be examined by the board of review, and the board, if it also finds that such record is legally insufficient to support the findings and sentence, in whole or in part, shall, in writing, submit its opinion to the Judge Advocate General, who shall transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President. In any such case the President may approve, disapprove, or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; and the President's necessary orders to this end shall be binding upon all departments and officers of the Government.

Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties.

Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Ad-

vocate General, the duties which the Judge Advocate General and the board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President.

This article is new.

Art. 51. Suspension of sentences of dismissal or death.—The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President.

Same as in Code of 1916.

Notes of Decisions.

<p>Commutation of sentence.—A general commanding the forces of the United States in the field does not possess power to commute the sentence of cashiering pronounced</p>	<p>by a court-martial, but only the power to execute the sentence, or to suspend it and take the direction of the President. (1853) 6 Op. Atty. Gen. 128. But see art. 50, ante.</p>
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Art. 52. Suspension of sentences.—The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension; and the Secretary of War or the commanding officer holding general court-martial jurisdiction over any such offender, may at any time thereafter, while the sentence is being served, suspend the execution, in whole or in part, of the balance of such sentence and restore the person under sentence to duty during such suspension. A sentence, or any part thereof, which has been so suspended may be remitted, in whole or in part, except in cases of persons confined in the United States Disciplinary Barracks or its branches, by the officer who suspended the same, by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person under sentence may be serving at the time, and, subject to the foregoing exceptions, the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof in so far as the same shall not have been previously remitted, subject to like power of suspension. The death or honorable discharge of a person under a suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.

The last part of the first sentence beginning with the words "and the Secretary of War" is new, as are the words "subject to like power of suspension" at the end of the second sentence; otherwise the same as art. 52, Code of 1916, as amended by the act of July 9, 1918 (40 Stat. 882).

Art. 53. Execution or remission—Confinement in disciplinary barracks.—When a sentence of dishonorable discharge has been suspended until the soldier's release from confinement, the execution or remission of any part of his sentence shall, if the soldier be confined in the United States Disciplinary Barracks, or any branch thereof, be directed by the Secretary of War.

Same as in Code of 1916 as amended by the act of July 9, 1918 (40 Stat. 882).

III. PUNITIVE ARTICLES.

A. ENLISTMENT; MUSTER; RETURNS.

Art. 54. Fraudulent enlistment.—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct.

Same as in Code of 1916.

Notes of Decisions.

Minors.—Minor held punishable if fraudulently enlisting in violation of Sixty-second (now Ninety-sixth) Article of War. *U. S. v. Williford* (C. C. A. 1915), 220 Fed. 291.

See *Ex parte Lewkowitz* (C. C. 1908), 163 Fed. 646, overruling *In re Carver* (C. C. 1900), 163 Fed. 624.

A military tribunal has jurisdiction to try offender under military age for offenses committed before his father's election to terminate his enlistment, though he was

not taken into custody until after such election. *U. S. v. Brown* (D. C. 1917), 242 Fed. 983; *Ex parte Foley* (D. C. 1917), 243 Fed. 470.

On habeas corpus an enlisted minor was remanded to custody of military authorities for trial for alleged offenses and service of any sentence imposed, but thereafter to be released from such custody. *Id.*

For enlistment of minors in general, see 2168, 2169, ante, and notes thereunder.

Art. 55. Officer making unlawful enlistment.—Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

Same as in Code of 1916.

For classes of persons whose enlistment is prohibited by statute, see 2168, 2169, ante, and by regulations, see par. 849, Army Regulations, 1913.

Art. 56. False muster.—Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

This article is the same as the last sentence of art. 50, Code of 1916. The portion of the former article not retained read as follows:

"ART. 50. MUSTER ROLLS.—FALSE MUSTER.—At every muster of a regiment, troop, battery, or company the commanding officer thereof shall give to the mustering officer certificates, signed by himself, stating how long absent officers have been absent and the reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent noncommissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster rolls, shall be transmitted by the mustering officer to the Department of War as speedily as the distance of the place and muster will admit."

Notes of Decisions.

Muster roll as evidence.—A copy of a copy of a muster roll is not competent evidence to show that a man enrolled therein

is a United States soldier. *People v. Riley* (1860), 15 Cal. 48.

Art. 57. False returns—Omission to render returns.—Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunition, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct.

This article is the same as art. 57, Code of 1916, as amended by the act of July 9, 1918 (40 Stat. 882), except that the first sentence of the former article, reading as follows, has been omitted:

"ART. 57. FALSE RETURNS—OMISSION TO RENDER RETURNS.—Every officer commanding a regiment, an independent troop, battery, or company, or a garrison shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same."

B. DESERTION; ABSENCE WITHOUT LEAVE.

Art. 58. Desertion.—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

Same as in Code of 1916.

Provisions for the arrest of deserters by civil officers were made by sec. 3, act of June 16, 1890, and sec. 6, act of June 18, 1898, ante 2210.

Besides the other penalties incurred a deserter forfeits any savings deposited with an Army paymaster under 1621, ante; in case of discharge or dismissal, any compensation for death or disability or war risk insurance, ante, 1917; a deserter may not receive a bounty land warrant, R. S. 2438, ante 1040, and forfeits all right to pension, by a provision of sec. 6, act of Apr. 26, 1898, ante 2212.

All persons who deserted the military or naval service of the United States during the rebellion were deprived of their right of citizenship, or their right to become citizens, and are made incapable of holding any office of trust or profit under the United States, by R. S., 1996; certain soldiers and sailors were excepted from the provisions of said section by R. S. 1997; and all persons who hereafter desert, etc., were to be subject to the penalties provided by R. S. 1996 and 1998, ante, 2213, 2177.

The joint resolution of Mar. 3, 1921, ante 2835, providing that certain statutes the operation of which is contingent upon the existence of a state of war shall be construed as if the World War had ended on Mar. 3, 1921, was, by its terms, not to apply to the offense of desertion. See 2238, ante.

For certain acts constituting desertion, see art. 28, ante.

Notes of Decisions.

Nature of offense in general.—Desertion from the Army is not a felony rendering the offender amenable to any civil jurisdiction. *Trask v. Payne* (N. Y. 1865), 43 Barb. 569.

Duly enlisted.—Every one connected with the military or naval service of the United States is amenable to the jurisdiction which Congress has created for their government, and surrenders his right to be tried by the civil courts. If, however, an alleged deserter was not ever duly enlisted in the United States service, he is not amenable to the jurisdiction of a court-martial. In *re Davison* (C. C. 1884), 21 Fed. 618, 619.

A person whose enlistment into the United States service was void or illegal can not commit the crime of desertion. In *re Davison* (C. C. 1884), 21 Fed. 618; in *re Baker* (R. I. 1885), 23 Fed. 30; *U. S. v. Wright* (C. C. 1862), Fed. Cas. No. 16,778.

But the question of the legality of an enlistment is one for a United States, and not for a State court. *State v. Zulich* (1862), 29 N. J. Law (5 Dutch.) 409.

Enlistment of minor, see notes to art. 54, ante.

Actual service.—Under this article, either receipt of pay or enlistment determines the status, and after enlistment the party

becomes amenable to military jurisdiction, although no actual service may have been rendered and no pay received. *U. S. v. Grimley* (1890) 11 Sup. Ct. 54, 56, 137 U. S. 147, 34 L. Ed. 636.

Absence without leave.—Absence of a soldier without leave is not desertion, unless an intention not to return to the service be shown. *Town of Hanson v. Town of South Scituate* (1874), 115 Mass. 336.

Desertion by minor.—See notes to 2169, ante.

Arrest and confinement of deserter.—See notes to 2210, ante.

Jurisdiction of court-martial.—A court-martial has exclusive jurisdiction to try a person duly enlisted in the Army for the military offense of desertion. In *re White* (C. C. 1883), 17 Fed. 723. And it is incompetent for a State court or judge, by a writ of habeas corpus, to take out of the hands of an officer a person held by the officer, under authority of the United States, as a deserter from the Army, whether such person was detained by judicial process or simply by authority of law. In *re Hopson* (N. Y. 1863), 40 Barb. 34.

A deserter from the Army, who has never been discharged from the service, is still subject to the jurisdiction of a military tribunal, so that, though he may plead the statute of limitations as a defense to a prosecution for desertion, a civil court will not interfere with such a prosecution by a military tribunal before that court has acted on and decided the case. In *re Cadwallader* (C. C. 1904), 127 Fed. 881.

Draft.—The selective service act and the rules promulgated by the President thereunder did not require actual personal service of the notice to report to the adjutant general of the State for instructions (Form 1014, S. S. R.). It is clear that it was intended by the law-making power that constructive service by the use of the Post Office Department of the Government in the giving of notice by the administrative boards and officers charged with and engaged in the enforcement of the act should be deemed in law sufficient, and that actual personal notice of service of such formal orders as Forms 1014 and 1015, S. S. R., is not required by the act. In *re Bergdoll* (D. C. April, 1921), — Fed. —; but

see *Farley v. Ratliff* (C. C. A. 1920), 267 Fed. 682.

Where the orders required by law to be given essential to the induction of a person into the service of the country as a soldier, under the selective service act and the rules made in pursuance thereof, are shown to have been duly made and mailed to him at his post-office address as by him given to the authorities, the same must be presumed to have been by him received, in the absence, at least, of any positive showing to the contrary. In *re Bergdoll* (D. C. April, 1921), — Fed. —. But a notice under S. S. R. 133 (which requires the adjutant general of a State to notify delinquents by mail, etc., to report for instructions) mailed to the wrong address and never received by the delinquent is insufficient to bring him into the military service. *Ex parte Goldstein* (D. C. 1920), 268 Fed. 431.

A drafted man, ordered to report for service under the selective service act, but remaining in hiding until after the draft boards were abolished, may be tried by court-martial for desertion without a preliminary investigation before the draft board, as such investigation under a presidential order was a mere procedural step, the abolition of which does the drafted man no harm. *U. S. v. Lehman* (D. C. 1920), 265 Fed. 852.

Evidence.—An entry on the muster roll of a company that a member thereof has deserted is not conclusive of the truth of the charge. And indorsements made on a certificate of discharge of a soldier without his consent, stating that he had deserted, will not affect its admissibility to prove that he was honorably discharged. *Town of Hanson v. Town of South Scituate* (1874), 115 Mass. 336.

Criminal action.—A soldier can not defeat the sentence of a court-martial based on his desertion by pleading the pendency of a prosecution against him for the civil offense involved under the selective service act of May 18, 1917. *Ex parte Dunn* (D. C. 1918), 250 Fed. 871.

A defendant, tried by court-martial under this article for desertion based on failure to file a questionnaire and fleeing to escape military duty, and acquitted, can not thereafter be tried by a Federal district court for failing to answer his questionnaire. *U. S. v. Block* (D. C. 1920), 262 Fed. 205.

Art. 59. Advising or aiding another to desert.—Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the

offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

Same as in Code of 1916.

For statute covering case where offender is not a person subject to military law, see 2208, ante.

Art. 60. Entertaining a deserter.—Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct.

Same as in Code of 1916.

For statute covering case of harboring a deserter generally, see 2209, ante.

Art. 61. Absence without leave.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

Same as in Code of 1916.

Notes of Decisions.

Deduction of reward from pay.—The amount of the reward paid for the apprehension of a deserter, who upon trial by a court-martial for desertion has been convicted only of the offense of absence with-

out leave, can not lawfully be stopped against his pay in a case where the sentence of the court does not impose such stoppage. (1880) 16 Op. Atty. Gen. 474.
See also notes under art. 58, ante.

C. DISRESPECT; INSUBORDINATION; MUTINY.

Art. 62. Disrespect toward the President, Vice President, Congress, Secretary of War, governors, legislatures.—Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

Same as in Code of 1916.

Art. 63. Disrespect toward superior officer.—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

Same as in Code of 1916.

Art. 64. Assaulting or willfully disobeying superior officer.—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

Same as in Code of 1916.

Art. 65. Insubordinate conduct toward noncommissioned officer.—Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a noncommissioned officer while in the execution of his office or uses threatening or insulting

language, or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

Same as in Code of 1910, except that the words "of a warrant officer or" in the third line and "a warrant officer or" in the fifth and sixth lines are new.

Art. 66. Mutiny or sedition.—Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.

Same as in Code of 1910.

Besides other penalties a person discharged or dismissed because of mutiny forfeits all right to compensation for death or disability or to war-risk insurance, ante 1917.

Notes of Decisions.

<p>Minors.—Since a minor's contract of enlistment is voidable only, the minor may be tried on a charge of mutiny, preferred</p>	<p>before the contract had been avoided. In <i>re Dew</i> (Mass. 1862), 25 Law Rep. 538.</p>
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Art. 67. Failure to suppress mutiny or sedition.—Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court-martial may direct.

Same as in Code of 1910.

Art. 68. Quarrels; frays; disorders.—All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks, Quartermaster Corps, and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer, nurse, band leader, warrant officer, field clerk, or noncommissioned officer, or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court-martial may direct.

The words between the word "officers" and the words "and non-commissioned officers," in the first and second lines, and between the word "officer" and the words "or non-commissioned officer," in the last sentence are new.

A band leader is a warrant officer (ante, 2139) and the failure to enumerate band leaders as among those to whom the above power is given (while mentioning them in the latter part of the section) is therefore immaterial.

Notes of Decisions.

<p>Suppressing disorders.—In suppressing disorders, etc., means should be proportioned to ends to be gained; violent measures, clearly unnecessary, will not be justified. <i>U. S. v. Carr</i>, 1 Woods, 480.</p>	
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D. ARREST; CONFINEMENT.

Art. 69. Arrest or confinement.—Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest as circumstances may require; but when charged with a

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minor offense only such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct.

Art. 69, Code of 1916, read as follows:

"ART. 69. ARREST OR CONFINEMENT OF ACCUSED PERSONS.—An officer charged with crime or with a serious offense under these articles shall be placed in arrest by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same authority. A soldier charged with crime or with a serious offense under these articles shall be placed in confinement, and when charged with a minor offense he may be placed in arrest. Any other person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; and when charged with a minor offense such person may be placed in arrest. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer who breaks his arrest or who escapes from confinement before he is set at liberty by proper authority shall be dismissed from the service or suffer such other punishment as a court-martial may direct, and any other person subject to military law who escapes from confinement or who breaks his arrest before he is set at liberty by proper authority shall be punished as a court-martial may direct."

Notes of Decisions.

Trial after expiration of term of enlistment.—A soldier, if arrested before the expiration of his term of enlistment, may be held for trial thereafter by military authority. *In re Bird* (D. C. 1871), Fed. Cas. No. 1, 428.

Retired officers.—Under this article a retired officer may be arrested and tried by court-martial. *Closson v. U. S.* (1896), 7 App. D. C. 460.

Habeas corpus.—In order to make a case for habeas corpus there must be actual confinement or the present means of enforcing it; mere moral restraint is not sufficient. Hence an order placing a naval officer in arrest and directing him to confine himself to the limits of the city of Washington is not sufficient grounds for the use of the writ. *Wales v. Whitney* (1885), 144 U. S. 564; *In re Feinler* (Sup. Ct. D. C. 1921), 49 Wash. L. R. 147.

Art. 70. Charges; action upon.—Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

Art. 70, Code of 1916, read as follows:

"ART. 70. INVESTIGATION OF AND ACTION UPON CHARGES.—No person put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. But persons released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest: *Provided*, That in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."

Notes of Decisions.

Construction in general.—The provisions of this article refer to arrest and custody before trial and have no application to confinement after trial and while awaiting execution of sentence. *U. S. v. Barry* (D. C. 1919), 260 Fed. 291. *In re Corbett* (D. C. 1877), Fed. Cas. No. 3,219.

Notice.—A sentence rendered by a court-martial against an individual without notice is void. *Meade v. Deputy Marshal* (C. C. 1815), Fed. Cas. No. 9,372.

Specification of charges.—As to the perspicuity and precision of the charges, if the description of the offense is sufficiently clear to inform the accused of the military offense for which he is to be tried, and to enable him to prepare his defense, it is sufficient. (1819) 1 Op. Atty. Gen. 294. A specification is good, and will support the

finding and sentence upon it, with or without descriptive designation of the quality of the imputed criminal act, provided it appear that the facts alleged and proved constitute, in any point of view, the offense charged. (1855) 7 Op. Atty. Gen. 601.

Joinder.—There is no objection to the joinder of separate and incongruous charges in the same prosecution before a court-martial, as such is permitted by military usage and procedure. (1890) 22 Op. Atty. Gen. 589.

Amendment.—The charges can not be so amended after arraignment as to entirely obliterate the original specifications, and insert new ones, describing wholly different offenses. *Ex parte Henderson* (C. C. 1878), Fed. Cas. No. 6,849.

Art. 71. Refusal to receive and keep prisoners.—No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his

charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct.

Same as in Code of 1916.

Notes of Decisions.

Receiving prisoner.—In an English case it was held that "a commanding officer receiving a soldier charged with desertion by a noncommissioned officer, who delivered a written signed charge of the same, is justified under this article in detaining such soldier. He is bound to receive the prisoner under the article of war and he is not liable to an action for so doing. It makes no difference whether the crime be civil or military. The fact that a man is *prima*

facie a soldier, and enlisted, is sufficient to bring him under the article of war. The duty of receiving arises so instant—as soon as he is presented." *Wolton v. Gavin*, 16 Ad. and El. 70.

If such imprisonment proves illegal, the committing officer becomes responsible, the duty of the officer commanding the guard being ministerial merely. *McCall v. McDowell*, 1 Abbott, 212.

Art. 72. Report of prisoners received.—Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report he shall be punished as a court-martial may direct.

Same as in Code of 1916.

Art. 73. Releasing prisoner without proper authority.—Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

Same as in Code of 1916.

Art. 74. Delivery of offenders to civil authorities.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

Same as in Code of 1916.

During the World War the War Department issued instructions covering this subject. Par. 2 of a letter of Dec. 3, 1917, from The Adjutant General's Office read as follows:

"It is the policy of the War Department, under the 74th Article of War, to decline in time of war to turn over to the civil authorities one who is subject to military jurisdiction and charged with a civil offense except where the offense charged is a most serious one, such as common-law felonies, primarily against the civil community, which would serve to disqualify the offender for military service and association with upright and honorable men, and where the commanding officer reasonably believes that the charge is not without proper foundation and that the accused will be accorded a fair trial without prejudice due to his military status."

Said letter also prescribed the procedure to be followed in case of the application of the civil authorities for the surrender of men.

Notes of Decisions.

See also notes under art. 92, post.

Operation on civil and criminal laws in general.—The articles of war do not take the place and can not serve to supersede the civil or criminal laws, and this fact is recognised by this section. In re Kelly (C. C. 1895), 71 Fed. 545, 553.

This section is a distinct recognition by Congress of the general jurisdiction in time of peace of the civil courts of the States over persons in the United States military service accused of offenses against citizens of the State. U. S. v. Lewis (C. C. 1904), 129 Fed. 823; affirmed (1906), 26 Sup. Ct. 229, 200 U. S. 1, 50 L. Ed. 343.

The (former) sixty-second article of war (now A. W. 96) does not purport to vest exclusive jurisdiction in courts-martial, and civil courts have concurrent jurisdiction over all offenses committed by a military officer which may be punished under that article. *Franklin v. U. S.* (1910), 216 U. S. 559. For other decisions, see notes to art. 92, post.

Federal jurisdiction.—Where a prisoner is an offender under both the military and criminal law of the United States, which department of the Government shall first proceed against him is a matter to be settled between them. *Ex parte Dunn* (D. C. 1918), 250 Fed. 371.

The Federal circuit court has jurisdiction of a homicide committed by one soldier upon another within a military reservation of the United States. *U. S. v. Clark* (1887), 31 Fed. 710.

Laws of the land.—A city ordinance is within the expression "laws of the land," as used in this section, and a soldier violating such an ordinance and escaping to a military reservation should be delivered on demand to the civil authorities for trial. (1894) 21 Op. Atty. Gen. 88.

Delivery to civil magistrates.—This section does not require that a private, committing murder in Cuba subsequent to the treaty of peace with Spain, be delivered to the Cuban courts, but it is nevertheless proper to permit such courts to try him. (1900) 23 Op. Atty. Gen. 120.

Demand.—A demand by a civil magistrate, stating that certain officers, naming them, "are charged on oath before me with having violated the known laws of the land, and especially of the State of New Jersey," etc., held not sufficiently specific, and ought not to be acceded to, under this section. (1825) 2 Op. Atty. Gen. 11.

Procedure.—For discussion of proper procedure where officer or soldier of the United States is in custody under process of a State court for an alleged offense against State laws arising out of act claimed to have been done in his official capacity, see *Castle v. Lewis* (C. C. A. 1918), 254 Fed. 917.

Double jeopardy.—The same acts constituting a crime against the United States can not, after conviction of the accused in a court of competent jurisdiction (in this case a court-martial), be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government. *Grafton v. U. S.* (1907), 206 U. S. 333, 352. See also *U. S. v. Block* (D. C. 1920), 262 Fed. 205; compare *In re Fair* (1900), 100 Fed. 149; *U. S. v. Clark* (1887), 31 Fed. 710.

Immunity from State laws.—A Federal court may issue a writ of habeas corpus to inquire into the cause of detention of a prisoner held by a State court on a criminal charge, and, if the court is satisfied that the alleged offense was committed in the performance of his duty as a soldier of the United States, may discharge the prisoner, on the ground that the State court is without jurisdiction. *U. S. v. Lipsett* (D. C. 1907), 156 Fed. 65; *In re Wulsen* (D. C. 1916), 235 Fed. 362; *Castle v. Lewis* (C. C. A. 1918), 254 Fed. 917; *In re Lewis* (D. C. 1897), 88 Fed. 159.

A person in the military service of the United States may not be prosecuted in a State court for violating a State law regulating the speed of motor vehicles where the violation was a matter of military necessity. *State v. Burton* (R. I. 1918), 103 Atl. 962.

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Federal law paramount.—If military authorities have the right to try members of the military forces for violations of State law or municipal ordinances, it is by virtue of a Federal law, not of custom. If there

is such a law, it is paramount, and the enforcement of it will not deprive any citizen of any right under the State law. In re Wulzen (D. C. 1916), 235 Fed. 362.

E. WAR OFFENSES.

Art. 75. Misbehavior before the enemy.—Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up or by any misconduct, disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct.

The words preceding the word "fort" in art. 75, Code of 1916, were as follows: "Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up any"; otherwise the same.

Art. 76. Subordinates compelling commander to surrender.—Any person subject to military law who compels or attempts to compel any commander of any garrison, fort, post, camp, guard, or other command, to give it up to the enemy or to abandon it shall be punishable with death or such other punishment as a court-martial may direct.

Art. 76, Code of 1916, read as follows:

"ART. 76. SUBORDINATES COMPELLING COMMANDER TO SURRENDER.—If any commander of any garrison, fort, post, camp, guard, or other command is compelled, by the officers or soldiers under his command, to give it up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death or such other punishment as a court-martial may direct."

Art. 77. Improper use of countersign.—Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct.

Same as in Code of 1916.

Art. 78. Forcing a safeguard.—Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

Same as in Code of 1916.

Art. 79. Captured property to be secured for public service.—All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.

Same as in Code of 1916.

Notes of Decisions.

Captured property.—This article is in accordance with the principle of international law that enemy's property duly captured in war becomes the property of the Government or power by whose forces it is

taken, and not that of the individuals who take it. U. S. v. Klein, 13 Wallace, 136; Decatur v. U. S., Devereux, 110; White v. Red Chief, 1 Woods, 40; 13 Op. Atty. Gen. 105.

Art. 80. Dealing in captured or abandoned property.—Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who falls whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

Same as in Code of 1916.

Art. 81. Relieving, corresponding with, or aiding the enemy.—Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct.

Same as art. 81, Code of 1916, except that the words "or attempts to relieve" are new.

For the civil offenses classified as disloyalty, see chap. 45, ante, and for the civil offenses involved in trading with the enemy, see chap. 46, ante.

Notes of Decisions.

War.—When Indian tribes were carrying on a system of attacks upon the property or persons, or both, of the settlers upon our frontiers, or of the travelers across our territories, and the troops of the United States were engaged in re-

peating such attacks, there was war in such a sense as would justify the enforcement of this article against persons found relieving the enemy with ammunition, etc. (1871) 13 Op. Atty. Gen. 470.

Art. 82. Spies.—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

Same as in Code of 1916; the former article, in effect, superseded R. S. 1343.

Besides other penalties a person discharged or dismissed because of spying forfeits all right to compensation for death or disability or to war-risk insurance, ante, 1917.

Notes of Decisions.

Constitutionality.—This section, as well as former articles 60 and 63 (now arts. 94, post, and 2, ante) makes persons not strictly in the military service amenable to court-martial jurisdiction. Such statutes are not unconstitutional as being in conflict with the fifth amendment. *Ex parte Wildman* (1876), Fed. Cas. No. 17, 653a; (1879) 16 Op. Atty. Gen. 292.

The guarantees of the Fifth and Sixth Amendments apply only to a "crime," which word does not include the offense of being a spy. *U. S. v. McDonald* (D. C. 1920), 265 Fed. 756.

Status of spy on restoration of peace.—One can not be held as a spy who was not brought to trial and punishment during the existence of war. *In re Martin* (1865), 45 Barb. (N. Y.), 142.

Trial by military tribunal.—A person apprehended upon United States territory not under martial law, who had not entered any camp, fortification, or other military premises of the United States, and who had not come through the fighting lines or field of military operations, can not be tried as a spy by a military tribunal, and to such a case R. S. 1343 (embodied in the

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above article) and the above article can not constitutionally be applied. (1918) 31 Op. Atty. Gen. 356.

A naval court-martial has jurisdiction, under art. 5 of the Articles for the Government of the Navy, to try a German spy who, during the World War, entered the United

States under a false name and on a forged passport, and who was arrested in New York city. The port of New York can not be considered outside the field of active operations and outside the theater of war. *U. S. v. McDonald* (D. C. 1920), 265 Fed. 756.

F. MISCELLANEOUS CRIMES AND OFFENSES.

Art. 83. Military property—Willful or negligent loss, damage, or wrongful disposition.—Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct.

Same as in Code of 1916.

Art. 84. Waste or unlawful disposition of military property issued to soldiers.—Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct.

Same as in Code of 1916.

For the civil offense involved in purchasing or receiving in pledge Government property furnished a soldier, presumption arising from possession of the same, etc., see 815-817. ante.

Notes of Decisions.

Sale of clothing.—The sale of military clothing issued to a soldier during his term of service constitutes an offense against the military law, for which he may be pun-

ished by a court-martial, as provided by the Seventeenth Article of War (now art. 84). *U. S. v. Michael* (D. C. 1907), 153 Fed. 609.

Art. 85. Drunk on duty.—Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty shall be punished as a court-martial may direct.

Same as in Code of 1916.

Notes of Decisions.

Duty.—Officers of the Army are in the eye of the law on military duty, although employed as such officers under statute of the United States in the public service on

duties not in themselves pertaining to the Army. *Carter v. McClaughry* (1902), 183 U. S. 305, 399.

Art. 86. Misbehavior of sentinel.—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

Same as in Code of 1916.

Art. 87. Personal interest in sale of provisions.—Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon

or is interested in the sale of any victuals or other necessaries of life brought into such garrison, fort, barracks, camp, or other place for the use of the troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

Same as in Code of 1916.

Art. 88. Intimidation of persons bringing provisions.—Any person subject to military law who abuses, intimidates, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessaries to the camp, garrison, or quarters of the forces of the United States shall suffer such punishment as a court-martial may direct.

Same as in Code of 1916.

Art. 89. Good order to be maintained and wrongs redressed.—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depredation or riot, shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided for in article 105, shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

Same as in Code of 1916.

Art. 90. Provoking speeches or gestures.—No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

Same as in Code of 1916.

Art. 91. Dueling.—Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

Same as in Code of 1916.

Art. 92. Murder—Rape.—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

Same as in Code of 1916.

For additional penalties prescribed by statute, see 1917, ante.

Notes of Decisions.

See also notes under art. 74, ante.	
Time of war.—The provision of this article that no person shall be tried by court-martial for murder committed within the geographical limits of the United States	in time of peace is not applicable to any time between the declaration of war and the official conclusion of peace, although the place of war was not within the United States. <i>Ex parte Givens</i> (1920), 262 Fed.

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702; affirmed, *sub. nom.* *Givens v. Zerbst* (1921), 254 U. S. —; 65 L. Ed. 284.

Peace in the complete legal sense, officially proclaimed, is what is meant by the phrase "in time of peace" in this article. *Id.*; *Kahn v. Anderson* (1921), 254 U. S. —; 65 L. Ed. 288.

Whether a condition of war exists, within this section, is within the exclusive jurisdiction of the political department of the Government. The "Boxer uprising" held to constitute "a time of war." *Hamilton v. McClaughry* (C. C. 1905), 136 Fed. 445. This section held not applicable to Cuba after the treaty of peace with Spain, and further held that a private of the Second United States Artillery, who committed homicide in Cuba at such time, the victim being a teamster in the military service, should not be tried by court-martial nor by a military commission. (1900), 23 Op. Atty. Gen. 120.

Where a soldier, while on duty in 1881 at a jail, maliciously attempted to kill a prisoner, and was by the authority of the United States confined there, and no application was made for the delivery of the soldier to the civil authorities, but he was tried by a general court-martial and sentenced to be imprisoned in the penitentiary for eight years and to be dishonorably discharged from the service, with forfeiture of his pay, it was held that the 58th and 59th articles, as then existing, had no application. *Ex parte Mason* (1881), 105 U. S. 696, 26 L. Ed. 1213.

Civil authorities.—In time of war, on making demand for the delivery of the accused, the military authorities have jurisdiction, under this article, superior to that of the civil authorities to try a soldier who shot and killed a civilian (not on a military reservation). Query, whether or not, under such circumstances, the jurisdiction is not exclusive. *Ex parte King* (D. C. 1917), 246 Fed. 868, 873; but see *U. S. v. Hirsch* (D. C. 1918), 254 Fed. 109, and

Caldwell v. Parker, post. But the State authorities may proceed to try and punish such an offender in the absence of an assertion of their jurisdiction by the military authorities. *People v. Denman* (Calif. 1918), 177 Pac. 461; *Funk v. State* (Tex. 1919), 208 S. W. 509; *Stewart v. Commonwealth* (Ky. 1919), 213 S. W. 185.

The existence of a state of war does not so enlarge the military power as to make void the trial and conviction of a soldier serving in a camp, for a murder committed not within the confines of any camp or place subject to the civil or military authorities of the United States. *Caldwell v. Parker* (1920), 252 U. S. 376 (approving the *Hirsch*, *Denman* and *Funk* cases above cited, but expressly declining to pass on the question decided in *Ex parte King*, ante).

A State court in Tennessee held to have no jurisdiction to try a person for murder alleged to have been committed on February 22, 1865, while accused was a soldier in the United States Army, such offense being triable by court-martial. *Tennessee v. Hibdon* (C. C. 1885), 23 Fed. 795.

Where soldiers, in pursuance of orders, shot and killed a fleeing prisoner, after due warning to halt, some three miles from the military reservation from which he had escaped, held that they acted within the authority conferred on them under Federal law and should be discharged on habeas corpus from the custody of State authorities holding them under a charge of murder. *In re Fair* (1900), 100 Fed. 149; but see *Drury v. Lewis* (1906), 200 U. S. 1.

Excusable homicide.—Where a sergeant of the guard shot a general prisoner to prevent his escape from the reservation, held that as there was an absence of malice and the sergeant acted in the performance of his supposed duty, the homicide was excusable. *U. S. v. Clark* (1887), 31 Fed. 710.

Art. 93. Various crimes.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

Same as art. 93, Code of 1916, except for the following additions: After the word "burglary" the word "housebreaking"; after the word "perjury" the words "forgery, sodomy"; after the word "felony" the words "assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing".

For additional penalties prescribed by statute, see 1917, ante.

Notes of Decisions.

Former article.—Under former art. 58, authorizing a court-martial, in time of war, to punish the offenses of "assault and battery with intent to kill" and "wounding by shooting or stabbing with intent to commit murder," a court-martial held without jurisdiction to impose imprisonment on an

accused on conviction of assaulting another by cutting him with a knife, without intent to kill, or for assaulting another by shooting at him with a pistol with intent to kill. *Anderson v. Crawford* (C. C. A. 1920), 265 Fed. 504.

Art. 94. Frauds against the Government.—Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; or

Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing,

subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same;

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. And if any officer, being guilty, while in the military service of the United States, of embezzlement of ration savings, post exchange, company, or other like funds, or of embezzlement of money or other property intrusted to his charge by an enlisted man or men, receives his discharge, or is dismissed, or is dropped from the rolls, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so discharged, dismissed, or dropped from the rolls.

Same as in Code of 1916, except that the last sentence is new.
For additional penalties prescribed by statute, see 1917, ante.

Notes of Decisions.

See, also, notes to arts. 95 and 96, post.
Forgery.—A clerk in the employ of a paymaster of the United States Army is in the military service, and subject to trial by court-martial for forging vouchers in the disbursement of a reconstruction fund. *In re Thomas* (D. C. 1869), Fed. Cas. No. 13,888.

Embezzlement.—The embezzlement by an Army officer of moneys appropriated for river and harbor improvements, with whose disbursement he is intrusted, in violation of R. S. 5488, now 280, ante, of this compilation, relating to the improper disposition of public money by any disbursing officer of the United States, is not the embezzlement of money furnished or intended for the military service, within the meaning of this section. *Carter v. McLaughry* (1902), 22 Sup. Ct. 181, 193, 183 U. S. 365, 46 L. Ed. 236, affirming *Carter v. McLaughry* (C. C. 1900), 105 Fed. 614, 619, in which case it was further held that the charge of embezzlement as defined in said R. S. 5488, ante, 280, was broader than that defined in either the first, fourth, or ninth paragraphs of this section.

Misappropriation of money.—Under the grant of jurisdiction to a court-martial conferred by this section, such a court has no power to convict an officer of the Army for misappropriating money appropriated by Congress for the improvement of rivers and harbors. *In re Carter* (C. C. 1899), 97 Fed. 496, 499, appeal dismissed (1900), 20 Sup. Ct. 713, 177 U. S. 406, 44 L. Ed. 861.

Contractors.—This section, as originally enacted, included, among those enumerated

as coming within its provisions, "any contractor, agent, paymaster, quartermaster, or other person whatsoever in said forces or service." Construing said section, including the provision above quoted, it has been held that it was expressly limited to persons in the land or naval forces, or in the militia, in the actual service of the United States, and that it gave no power to try by court-martial a mere contractor to furnish supplies to the Government for the use of the military service. *Ex parte Henderson* (C. C. 1878), Fed. Cas. No. 6,349.

Evidence as to conspiracy.—Testimony tending to show such a relation or understanding between alleged conspirators as would be indicative of a purpose to defraud the Government by means of contracts for public works to be given out and carried on under charge of the accused would be admissible, even though it related to matters antedating the time of the particular conspiracy charged. (1899) 22 Op. Atty. Gen. 589.

Punishment.—A person sentenced by a court-martial to fine and imprisonment for presenting fraudulent claims to the United States may be punished by dismissal from the service for the same offense, as conduct unbecoming an officer. *Carter v. McLaughry* (1902), 22 Sup. Ct. 181, 190, 183 U. S. 365, 46 L. Ed. 236; *Rose v. Roberts* (1900), 99 Fed. 948, 40 C. C. A. 199.

The mere fact that the same acts are specified in support of separate charges against an Army officer before a court-martial does not destroy the distinctive character of the offenses charged, or consti-

tute the splitting of a single offense into a number of distinct offenses, if different elements enter into each offense which must be proved to warrant a conviction. *Carter v. McClaughry* (C. C. 1900), 105 Fed. 614, order affirmed (1902), 22 Sup. Ct. 181, 183 U. S. 865, 46 L. Ed. 236.

Twice in jeopardy.—A person is not twice put in jeopardy by a sentence of a court-martial imposing both fine and imprisonment upon an officer convicted upon two charges of violating this section, one of which charges was a conspiracy to defraud the United States, and the other the causing of false and fraudulent claims to be made against the United States, even if the punishment prescribed by this section is confined to a fine or imprisonment in the alternative, as such charges are separate offenses, although growing out of one transaction. *Carter v. McClaughry* (1902), 22 Sup. Ct. 181, 189, 183 U. S. 865, 46 L. Ed. 236, affirming (C. C. 1900), 105 Fed. 614.

Imprisonment.—The word "imprisonment," as used in this section, was not employed in a technical sense to signify imprisonment at a military post without hard labor, but has a broader signification, and empowers a court-martial to sentence a person in the military service to imprisonment at hard labor, or to a penitentiary where hard labor is a part of the discipline, where the offense of which he is convicted is one for which the civil tribunals could impose a like sentence. In *re Langan* (C. C. 1903), 123 Fed. 132.

Fine and imprisonment.—Under this section a person convicted of two offenses named therein may be punished by fine as to one and by imprisonment as to the other.

Rose v. Roberts (1900), 99 Fed. 948, 40 C. C. A. 199. And where a single sentence is pronounced on such conviction, imposing both fine and imprisonment, it will be presumed that the punishment was so distributed between the charges. *Carter v. McClaughry* (C. C. 1900), 105 Fed. 614; order affirmed (1902), 22 Sup. Ct. 181, 183 U. S. 865, 46 L. Ed. 236.

Dismissal from service.—The fact that an Army officer sentenced by a court-martial to fine and imprisonment is by the same judgment dismissed from the service does not deprive the military authorities of jurisdiction to carry out the sentence. *Rose v. Roberts* (1900), 99 Fed. 948, 40 C. C. A. 199.

Sentence in gross.—An indefinite number of offenses may be adjudicated together in one proceeding by a court-martial, and a single sentence rendered covering all the convictions. *Rose v. Roberts* (1900), 99 Fed. 948, 40 C. C. A. 199. And the validity of such a sentence is not affected by the setting aside of the conviction as to some of the charges, provided it is not greater than might have been imposed on the charges supporting which the findings are approved. *Carter v. McClaughry* (C. C. 1900), 105 Fed. 614; order affirmed (1902), 22 Sup. Ct. 181, 183 U. S. 305, 46 L. Ed. 236.

Implied repeal.—This article is not amended or repealed by act of Oct. 23, 1918, amending sec. 35, Criminal Code (40 Stat. 1015), nor does such act deprive court-martial of jurisdiction in respect to persons in the military or naval service. *U. S. v. Barry* (D. C. 1919), 260 Fed. 291.

Art. 95. Conduct unbecoming an officer and gentleman.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

Same as in Code of 1916.

Notes of Decisions.

Conduct unbecoming an officer and gentleman.—The articles of war do not define the offense covered by this section. Nor can courts of law do so. *Swalm v. U. S.* (1893), 28 Ct. Cl. 173.

The undefined offenses covered by the term "conduct unbecoming an officer and gentleman" must be determined by a higher code than that of criminal law. *Fletcher v. U. S.* (1891), 26 Ct. Cl. 541.

The same conduct, constituting an offense elsewhere provided for in the Articles of War, may also warrant a finding of guilty by a court-martial, under this section. In *re Carter* (C. C. 1899), 97 Fed. 496; appeal

dismissed (1900), 20 Sup. Ct. 713, 177 U. S. 496, 44 L. Ed. 861.

Conduct unbecoming an officer and a gentleman may consist in refusing to pay a debt. *Fletcher v. U. S.* (1891), 26 Ct. Cl. 541.

Untruthful statements made by a military officer to the official head of the War Department, with intent to deceive that officer, may be included in the term. (1885) 18 Op. Atty. Gen. 113, 119.

Twice in jeopardy.—An officer convicted of violation of this article, for which the only penalty is dismissal, can not in the same trial, on identical specifications and

the same proof, be adjudged guilty of A. W. 96, post, and sentenced to imprisonment as well as dismissed. The court, having tried, convicted, and sentenced him under A. W. 95, was without further power to try him under the general provisions of A. W. 96. *Ex parte Henkes* (D. C. 1919), 267 Fed. 276; reversed (C. C. A. 1921), — Fed. —.

Civil offense.—A conviction by a court-martial of a commissioned officer of the National Guard of conduct unbecoming an officer and of conduct to the prejudice of good order and military discipline held not a bar to a subsequent indictment for grand larceny founded on the same transaction. *People v. Wendel* (1908), 112 N. Y. Supp. 801.

Art. 96. General article.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

Same as in Code of 1916.

For additional penalties prescribed by statute see 1917, ante.

Notes of Decisions.

See, also, notes to arts. 94 and 95.

Offenses included.—The articles of war do not define the offenses named in this section. Nor can courts of law do so. *Swaim v. U. S.* (1893), 28 Ct. Cl. 173.

Embezzlement.—It is peculiarly for an Army court-martial to determine whether the crime of embezzlement charged is "to the prejudice of good order and military discipline," within the meaning of this section. *Carter v. McClaughry* (1902), 22 Sup. Ct. 181, 193, 183 U. S. 365, 46 L. Ed. 236, affirming order (C. C. 1900) 105 Fed. 614.

False statements.—False statements by an officer to the Secretary of War for the purpose of deceiving him are not so trivial in their nature as to be merely an offense against good order and military discipline, but are conduct unbecoming an officer and a gentleman. (1885) 18 Op. Atty. Gen. 113, 118.

Homicide.—A general court-martial has jurisdiction, under this section, as of a crime not capital, to try a soldier for homicide punishable, under Pen. Code P. I., art. 404, by imprisonment. *Grafton v. U. S.* (1907), 27 Sup. Ct. 749, 750, 206 U. S. 333, 51 L. Ed. 1084, 11 Ann. Cas. 640.

Misapplication of public moneys.—An Army officer who applies to a purpose not prescribed by law public moneys intrusted to him for river and harbor purposes, by

Other offenses.—A court-martial may properly acquit an officer of the charge of "conduct unbecoming an officer and a gentleman," yet at the same time convict him of the lesser offense of "conduct prejudicial to good order and military discipline." *Swaim v. U. S.* (1893), 28 Ct. Cl. 173.

Findings.—A court-martial has the right to substitute in its findings the words "conduct to the prejudice of good order and military discipline" for the words "conduct unbecoming an officer and a gentleman," as contained in the charge. (1885) 18 Op. Atty. Gen. 113, 114.

causing them to be paid out by checks on false accounts, in violation of R. S. 5488 (embodied in ante, 280), relating to the improper disposition of public moneys by a disbursing officer of the United States, may be convicted by an Army court-martial of a violation of this section. *Carter v. McClaughry* (1902), 22 Sup. Ct. 181, 193, 183 U. S. 365, 46 L. Ed. 236, affirming *Carter v. McClaughry* (C. C. 1900), 105 Fed. 614, 619.

Lesser offenses.—When it appears that an offense of which an officer was convicted is embraced in the one with which he was charged, it is a lesser offense of the same character, and the conviction is authorized by this article. *Bankhead v. U. S.* (1885), 20 Ct. Cl. 405.

Jurisdiction of offenses within section.—The contention that under this article a court-martial has exclusive jurisdiction over the crimes committed by a military officer which are cognizable by courts-martial under the provisions of this article is too clearly unfounded to serve as the basis of a writ of error from the supreme court to review a conviction in the circuit court. *Franklin v. U. S.* (1909), 30 Sup. Ct. 434, 436, 216 U. S. 559, 54 L. Ed. 615.

Where an offense is specifically provided for in any of the articles of war prior to this one, the grant of jurisdiction to a court-martial to try and punish such of

fense is conferred by the particular article which mentions it, and not by the general language of this article, providing for the trial and punishment of all offenses not capital, and all disorders, though not mentioned in the preceding articles. In re Carter (C. C. 1899), 97 Fed. 496.

Double jeopardy.—An acquittal of a charge of murder in a state court, to which the accused was handed over for trial by the military authorities, is no bar to his subsequent trial by court-martial for conduct to the prejudice of good order and military discipline. In re Stubbs (C. C. 1905), 133 Fed. 1012; see also *U. S. v. Maney* (C. C. 1894), 61 Fed. 140; *People v. Wendel* (1908), 112 N. Y. Supp. 301.

Sufficiency of charge.—A charge of assault with a rifle and the infliction of a mortal wound by accused upon a fellow soldier, with particulars of the time and place clearly stated, sufficiently alleged an offense within this article. In re Stubbs (C. C. 1905), 133 Fed. 1012.

Punishment.—Where an officer of the Army has been found guilty by a court-

martial of willfully misappropriating money appropriated by Congress, such court has authority to impose a penalty both by fine and imprisonment. In re Carter (C. C. 1899), 97 Fed. 496; appeal dismissed (1900), 20 Sup. Ct. 713, 177 U. S. 496, 44 L. Ed. 861.

Where the President has fixed a term of ten years as the maximum of imprisonment in cases prosecuted under this article, a court-martial, on convicting a soldier of conduct prejudicial to good order and military discipline in violation of this article, had jurisdiction to sentence accused to a term of five years' imprisonment, though such term extended beyond the term of military service for which he had enlisted. In re Stubbs (C. C. 1905), 133 Fed. 1012.

The punishment of military offenses and irregularities termed "conduct prejudicial to good order and military discipline" is within the discretion of a court-martial; but this discretion, though unrestricted in terms, must be exercised within reasonable limits. *Swain v. U. S.* (1893), 28 Ct. Cl. 173.

IV. COURTS OF INQUIRY.

Art. 97. When and by whom ordered.—A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer; but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into.

Same as in Code of 1916.

Notes of Decisions.

Nature of court of inquiry.—Courts of inquiry are inherently close courts, to which defendants generally, and auditors and spectators occasionally, have access by permission, and not of right. (1857) 8 Op. Atty. Gen. 337.

Limitations.—There is by law no prescription of time limiting the scope of inquiry of courts of inquiry whether in the Navy or the Army. (1857) 8 Op. Atty. Gen. 337.

The limitation of the eighty-eighth article of war (now embodied in article 39, ante), does not apply to courts of inquiry. (1853) 6 Op. Atty. Gen. 239.

Action of court of inquiry.—The action of courts of inquiry, whether as to transactions or persons, is not decisive, but advice only for the information of the executive. (1857) 8 Op. Atty. Gen. 337.

Ground for court of inquiry.—Where a military officer is charged by a citizen with fraudulent practices, the Secretary of War is justified in bringing the matter to the personal attention of the President, and the President in ordering a court of inquiry. *Swain v. U. S.* (1893), 28 Ct. Cl. 173.

Art. 98. Composition.—A court of inquiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder.

Same as in Code of 1916.

Art 99. Challenges.—Members of a court of inquiry may be challenged by the party whose conduct is to be inquired into, but only for cause stated to the court.

Art. 100.] MILITARY LAWS OF THE UNITED STATES.

The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time. The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection if such counsel be reasonably available.

Same as in Code of 1916.

Art. 100. Oath of members and recorders.—The recorder of a court of inquiry shall administer to the members the following oath: "You, A. B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you without partiality, favor, affection, prejudice, or hope of reward. So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A. B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."

In case of affirmation the closing sentence of adjuration will be omitted.

Same as in Code of 1916.

Art. 101. Powers; procedure.—A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the trial judge advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question.

Same as art. 101, Code of 1916, except that the word "trial" is inserted before the words "judge advocate".

Art. 102. Opinion on merits of case.—A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so.

Same as in Code of 1916.

Art. 103. Record of proceedings—How authenticated.—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court.

Same as in Code of 1916.

V. MISCELLANEOUS PROVISIONS.

Art. 104. Disciplinary powers of commanding officers.—Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command may, for minor offenses impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges for not exceeding one week, extra fatigue for not exceeding one week, restriction to certain specified limits for not exceeding one week, and hard labor without confinement for not exceeding one week, but shall not include forfeiture of pay or confinement under guard; except that in time of war or grave public emergency a commanding officer

of the grade of brigadier general or of higher grade may, under the provisions of this article also impose upon an officer of his command below the grade of major a forfeiture of not more than one-half of such officer's monthly pay for one month. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

This article omits matter which appeared in the first paragraph of art. 104, Code of 1916, as follows: After the words "President may prescribe", the words "and which he may from time to time, revoke, alter or add to", and after the words "minor offenses" the words "not denied by the accused." The first sentence of the second paragraph of the former article read as follows:

"The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard"; that portion of the said sentence, as it now stands, following the semicolon, is new; otherwise the paragraph is the same.

Art. 105. Injuries to property—Redress of.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board.

Same as art. 105, Code of 1916, except that the words "person or" were in the title of the former article, preceding the word "property."

Art. 106. Arrest of deserters by civil officials.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States.

Same as in Code of 1916.

Notes of Decisions.

Arrest without warrant.—A police officer of a State, or a private citizen, has no authority as such, without any warrant or military order, to arrest and detain a deserter from the Army. *Kurtz v. Moffit* (1885), 115 U. S. 487; *In re Fair* (C. C. 1900), 100 Fed. 149, 152; *Kendall v. Scheve* (1889), 3 Ohio C. C. 528.

Art. 107. Soldiers to make good time lost.—Every soldier who in an existing or subsequent enlistment deserts the service of the United States or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

Same as in Code of 1916.

The Regular Army Reserve was abolished by sec. 30, act of June 4, 1920, ante 2198.

Art. 108. Soldiers—Separation from the service.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

Same as in Code of 1916.

Notes of Decisions.

What constitutes a discharge.—The muster out of a volunteer soldier can not be viewed as in itself or by itself a discharge from service, and he is not to be regarded as discharged until he is released from military control and from subjection to the orders of his superior officers. (1870) 18 Op. Atty. Gen. 278.

A furlough to the reserve is not the equivalent of a discharge. *In re Markun* (D. C. 1916), 232 Fed. 1018.

Authority of President to discharge.—The contract of a soldier of the United States, made by his enlistment and oath to serve for a definite term, "unless sooner discharged by proper authority," is one terminable by the Government at will, acting through an officer having proper authority, and this article confers such authority upon, or recognizes it as existing in, the President of the United States. *Reid v. U. S.* (D. C. 1908), 161 Fed. 489.

Terms of discharge.—A certificate of discharge issued to a soldier of the United

States on his muster out is legal evidence of the fact of such discharge. *Adams County v. Mertz* (1866), 27 Ind. 103. It is also evidence to show that a soldier was honorably discharged. *Inhabitants of Fitchburg v. Inhabitants of Lunenburg* (1869), 102 Mass. 358; *Inhabitants of Hanson v. Inhabitants of South Scituate* (1874), 115 Mass. 336. But a certificate of an officer of the United States Army, showing an honorable discharge from the Army and stating that the character of the person discharged was good, is inadmissible to show his good character for peaceableness. *Taylor v. State* (1904), 48 S. E. 861, 120 Ga. 857. Nor is a certificate of a discharge, containing a description of his physical characteristics, admissible in evidence to show the height of the soldier. *Commonwealth v. Crowley* (1904), 26 Pa. Super. Ct. 124.

The terms of a discharge given to a soldier by order of the President, not being prescribed by any statute, are discretionary

with the President, and such discretion, exercised by directing a discharge "without honor," can not be reviewed by the courts. *Reid v. U. S. (D. C. 1908)*, 161 Fed. 469.

Regularly, an officer or soldier, upon his discharge from the military service, is entitled to an honorable discharge, unless he is under sentence of dishonorable dismissal, or unless he has been convicted of an infamous offense and is sentenced to punishment therefor during the remainder of his term of service, or of conduct reflecting upon his military career, such as cowardice, etc., with either of which conditions an honorable discharge would be incompatible. (1869) 13 Op. Atty. Gen. 10.

Where a person entered the military service in August, 1862, as a volunteer, to serve for three years, and subsequently deserted, but afterwards voluntarily returned to service under the President's proclamation (of pardon) of Mar. 11, 1865, and was mustered out of service along with his company July 2, 1865, it was held that the time which elapsed between his desertion and his return should not be credited to him in a discharge or otherwise, but that he is entitled to have his actual service credited to him in an honorable discharge. (1886) 18 Op. Atty. Gen. 427.

Correction of mistakes in discharge.—The War Department has power to correct mistakes made in granting discharges to soldiers. (1870) 13 Op. Atty. Gen. 201.

Cancellation of discharge.—Where an honorable discharge from the military service has in fact been received, and was given by competent authority, the subsequent cancellation of the discharge certificate, which is only evidence of such discharge, can not avoid the latter, nor make it capable of modification to the prejudice of the person discharged. (1869) 13 Op. Atty. Gen. 16.

Suspension of enlistment.—The Secretary of War can release a soldier from his contract of enlistment by a discharge, but has no power to suspend it, even with the soldier's consent. (1877) 15 Op. Atty. Gen. 362.

Alien enemy.—An alien in the military service who has only his first papers is not entitled to discharge therefrom on declaration of war with his country. *Halpern v. Commanding Officer (D. C. 1918)*, 248 Fed. 1003.

Discharge for disability.—The question whether a soldier shall be discharged from the Army because of physical disability is one solely for the military authorities. *U. S. v. Bell (D. C. 1918)*, 248 Fed. 1002; *In re Traina (D. C. 1918)*, 248 Fed. 1004.

Furlough to reserve.—Unauthorized acts of a company commander can not operate as a discharge or furlough to the reserve. *Ex parte Roach (D. C. 1917)*, 244 Fed. 625.

Art. 109. Oath of enlistment.—At the time of his enlistment every soldier shall take the following oath or affirmation: "I, ———, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War." This oath or affirmation may be taken before any officer.

Same as in Code of 1916.

Sec. 11, act of Aug. 3, 1861 (12 Stat. 289), conferred authority to administer the oath of allegiance to soldiers upon any commissioned officer of the Army.

Notes of Decisions.

Draft.—This article applies only to voluntary enlistments, and one certified into the service under the selective service act of May 18, 1917, can not escape liability to

military law because he had not taken the required oath. *Franke v. Murray (C. C. A. 1918)*, 248 Fed. 865.

Art. 110. Certain articles to be read and explained.—Articles 1, 2, and 29, 54 to 96, inclusive, and 104 to 109, inclusive, shall be read and explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read and explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States.

Same as in Code of 1916.

Art. 111.] MILITARY LAWS OF THE UNITED STATES.

Notes of Decisions.

Reading articles, etc.—The taking of the oath of allegiance is the pivotal fact which changes the status from that of a civilian to that of a soldier, and the fact that the Articles of War, many of which do not concern the duty of a soldier, are not read to a recruit before he took the oath, will not vitiate his enlistment. *U. S. v. Grimley* (1890), 11 Sup. Ct. 54, 56, 137 U. S. 147, 34 L. Ed. 636.

Art. 111. Copy of record of trial.—Every person tried by a general court-martial shall, on demand therefor, made by himself or by any person in his behalf, be furnished to a copy of the record of the trial.

Same as in Code of 1916.

Art. 112. Effects of deceased persons—Disposition of.—In case of the death of any person subject to military law the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects, and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors and to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, taking receipts therefor for file with said court's final report upon its transactions to the War Department; and as soon as practicable after the collection of such effects said summary court shall transmit such effects and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to the son, daughter, father, provided the father has not abandoned the support of his family, mother, brother, sister, or the next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions, to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army.

The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment.

Same as art. 112, Code of 1916, as amended by the acts of July 9, 1918 (40 Stat. 882) and Nov. 19, 1919 (41 Stat. 356), except that the matter following the words "debts due decedent's estate by local debtors", down to and including the words

"transactions to the War Department," is new. The phrase "place of command" is evidently an unintentional change from the phrase "place or command," as the article originally read in the Code of 1916. "Place of command" first appeared in the amendment of July 9, 1918.

Art. 113. Inquests.—When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death.

Same as in Code of 1916.

Art. 114. Authority to administer oaths.—Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law.

Same as in Code of 1916, except that the word "trial", is inserted before the words "judge advocate", twice in the third line.

See also ante, §7.

Art. 115. Appointment of reporters and interpreters.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission.

Same as in Code of 1916.

The rate of pay for reporters, other than enlisted men, is not prescribed by statute, but is set forth in the Manual for Courts-Martial; but for the statute regulating the rate of pay of enlisted men detailed as stenographic reporters, see 2195, ante.

Art. 116. Powers of assistant trial judge advocate and of assistant defense counsel.—An assistant trial judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused.

Same as art. 116, Code of 1916, except that the word "trial" is inserted before the words "judge advocate," and the last sentence is new.

Art. 117. Removal of civil suits.—When any civil or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section 33 of the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause.

Same as in Code of 1916.

Notes of Decisions.

See also notes to A. W. 74, ante.

Operation of article.—A soldier who is charged with murder of a citizen of a State has no right to removal of the prosecution from the State court to a Federal court under this article where it is not contended that the act was done under color of his office or status. *Funk v. State* (Tex. 1919), 208 S. W. 509.

Nor ordinarily where his trial by the State court will not seriously interfere with the enforcement of the laws of the United States or the operation of its Government. *Castle v. Lewis* (C. C. A. 1918), 254 Fed. 917.

Under a petition alleging, in effect, that plaintiff was a member of a military organization hostile to the United States, the ob-

ject of which was to aid rebels in arms in the Southern States to overthrow the Government and that the defendants, as members of the State militia forces, had been directed to aid in arresting plaintiff, by the general commanding said militia forces in the State of Indiana upon whom a request for such aid had been made by the general commanding the military forces of the United States in said State, held that the petition entitled the defendants to have an action for assault and battery and false imprisonment based on these facts removed to the United States Circuit Court, under sec. 5 of the act of Mar. 3, 1863 (12 Stat. 756). *McCormick v. Humphrey* (1866), 27 Ind. 144.

Art. 118. Officers, separation from service.—No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

Same as in Code of 1916, except that the word "general" is inserted in the fourth line before the word "court-martial."

See also R. S. 1229, ante, 2446.

The President was authorized to drop from the rolls of the Army any officer absent from duty three months without leave, etc., by another provision of said R. S. 1229, and by a provision of act of Jan. 19, 1911, ante, 2446.

Officers dismissed by sentence of a general court-martial formally approved can not be restored to the service except by reappointment. R. S. 1228, ante, 2448.

For right of an officer dismissed by the President to demand a trial, and effect of failure to convene a court-martial, see R. S. 1230, ante, 2447, and notes thereto.

Notes of Decisions.

Construction of section in general.—This section means that whereas, under act of July 17, 1862 (12 Stat. 596), as well as before its passage, the President alone was authorized to dismiss an Army or naval officer from the service for any cause which, in his judgment, either rendered such officer unsuitable for, or whose dismissal would promote, the public service, he alone shall not thereafter in time of peace exercise such power of dismissal, except in pursuance of a court-martial sentence to that effect, or in commutation thereof. It was not the purpose of the fifth section of the act of July 13, 1866 (embodied herein) to withdraw from the President the power, with the advice and consent of the Senate, to supersede an officer in the military or naval service by the appointment of another in his place. *Blake v. U. S.* (1880), 103 U. S. 227, 236, 26 L. Ed. 462.

Purpose of article.—The purpose of the act was, in times of peace, to suspend the broad power which the President exercised during the war. *McElrath v. U. S.* (1880), 102 U. S. 426, 438, 26 L. Ed. 189.

It was not the purpose of this section to withdraw from the President the

power to supersede or remove an officer of the Army by the appointment, by and with the advice and consent of the Senate, of his successor. *Blake v. U. S.* (1880), 103 U. S. 227, 236, 26 L. Ed. 462.

The word "commutation," used in sec. 2446, ante, is changed to "mitigation" in this article. *Hartigan v. U. S.* (1905), 25 Sup. Ct. 204, 205, 196 U. S. 169, 49 L. Ed. 434.

Dismissal in general.—Officers.—A sentence of "dismissal" is legal. (1829) 2 Op. Atty. Gen. 287, 297; (1841) 3 Op. Atty. Gen. 631.

Effect of dismissal.—An officer in the Army, who was dismissed from the service, by order of the President, did not regain his position by a subsequent revocation of that order. A vacancy was created which could be filled only by a new appointment. *U. S. v. Corson* (1885), 114 U. S. 610; (1842) 4 Op. Atty. Gen. 128; (1868) 12 Id. 421; *McElrath v. U. S.* (1876), 12 Ct. Cl. 201, in which the Court of Claims abandoned an earlier contrary view, expressed in a series of cases from *Smith v. U. S.* (1866), 2 Ct. Cl. 206, to *Montgomery v. U. S.* (1869), 5 Id. 93. See 2448, ante.

Art. 119. Rank and precedence among Regulars, Militia, and Volunteers.—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade.

Same as first sentence of art. 119, Code of 1916. The omitted portion read as follows:

"In the absence of such assignment by the President, officers of the same grade shall rank and have precedence in the following order, without regard to date of rank or commission as between officers of different classes, namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of forces drafted or called into service of the United States; and, third, officers of the volunteer forces: *Provided*, That officers of the Regular Army holding commissions in forces drafted or called into the service of the United States or in the volunteer forces shall rank and have precedence under said commissions as if they were commissions in the Regular Army; the rank of officers of the Regular Army under commissions in the National Guard as such shall not, for the purposes of this article, be held to antedate the acceptance of such officers into the service of the United States under said commissions."

Art. 120. Command when different corps or commands happen to join.—When different corps or commands of the military forces of the United States happen to join or do duty together, the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President.

Same as in Code of 1916.

Art. 121.] MILITARY LAWS OF THE UNITED STATES.

Notes of Decisions.

Officers of Marine Corps.—This section does not operate to give to officers of the Marine Corps any authority to exercise command in the Army, unless they have been detached for service with the Army by order of the President, and are still serving with the Army under that order. When any part of the Marine Corps is present with the Army and engaged in a common enterprise with it, without an order of the

President detaching it for service with the Army, the case is one of cooperation and not of incorporation, and in such a case no officer of the Marine Corps can exercise command over the Army any more than a naval officer can when some part of the Navy is cooperating with the Army; and the converse is true of Army officers cooperating with the Marine Corps. (1909) 28 Op. Att'y. Gen. 15.

Art. 121. Complaints of wrongs.—Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.

Same as in Code of 1916.

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